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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 32

IRON ROSS, AS RECEIVER OF THE FIRST NATIONAL BANK OF PERRY, ETC., PETITIONER,

vs.

W. V. KNOTT, AS TREASURER OF THE STATE OF FLORIDA, W. V. KNOTT, TREASURER OF THE STATE OF FLORIDA, AS EX-OFFICIO COUNTY TREASURER OF TAYLOR COUNTY, FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 21, 1937.

CERTIORARI GRANTED MAY 24, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA

No. 21. Equity

IRON ROSS, as Receiver of the First National Bank of Perry, a Corporation under the National Banking Laws, Plaintiff,

versus

W. V. KNOTT, as Treasurer of the State of Florida; W. V. KNOTT, Treasurer of the State of Florida, as Ex-Officio County Treasurer of Taylor County, Florida; Dave Sholtz, as Governor of the State of Florida; J. M. Lee, as Comptroller of the State of Florida; Taylor County, a Political Subdivision of the State of Florida; and W. V. Knott, Treasurer of Florida, Dave Sholtz, Governor of Florida, and J. M. Lee, Comptroller of the State of Florida, as Members of and constituting the Board of Administration of the State of Florida, Defendants

BILL OF COMPLAINT

To the Honorable Judge of the United States District Court, in and for the Northern District of Florida:

Plaintiff, Iron Ross, as Receiver of the First National Bank of Perry, a corporation organized and existing under the National Banking Laws of the United States of America, brings this, his Bill of Complaint, and complains of the defendants in the above stated cause, and respectfully represents unto the Court as follows:

I

That the plaintiff in this cause, Iron Ross, as Receiver of the First National Bank of Perry, is a citizen and resi-
[fol. 2] dent of the State of Florida; that the First National Bank of Perry is a National Banking Association under the Act of Congress, commonly known as the Na-

tional Bank Act; that the said Bank is domiciled in the City of Perry, County of Taylor and in the Northern District of Florida.

II

That this suit is brought:

(a) To set aside and to have declared null and void an agreement under which on March 12, 1930 W. L. Weaver, as Executive Vice-President of the First National Bank of Perry, undertook to pledge with W. V. Knott, Treasurer of the State of Florida, as Ex-Officio County Treasurer of Taylor County, $10,000.00 of the County of Sarasota bonds to secure any funds deposited by the Treasurer of the State of Florida in the First National Bank of Perry; also, to set aside and have declared null and void an agreement made on March 15, 1930, under the provisions of which W. L. Weaver, as Executive Vice-President of the First National Bank of Perry, undertook to pledge with W. V. Knott, Treasurer of the State of Florida, as Ex-Officio County Treasurer of Taylor County, Town of Perry bonds of the face value of $10,000.00 to secure any funds deposited by the Treasurer of Florida in the First National Bank of Perry; also, to have declared null and void and to set aside certain agreements made from time to time in 1929 and the early part of 1930 under which W. L. Weaver, as Executive Vice-President of the First National Bank of Perry, pledged with the Bond Trustees of Taylor County, Florida, certain securities, consisting of mortgages, notes and bonds to secure funds deposited by the Bond Trustees of Taylor County in the First National Bank of Perry, and to have declared null and void an assignment of the said [fol. 3] agreement and pledged securities aggregating the face value of $69,549.76, the said assignment having been made on May 2, 1930, by the Bond Trustees of Taylor County; to enjoin W. V. Knott, as Treasurer of the State of Florida, J. M. Lee, as Comptroller of the State of Florida, and Dave Sholtz, as Governor of the State of Florida, the said officials constituting the Members of the Board of Administration of the State of Florida, from undertaking to sell said securities and applying the proceeds of sale in accordance with the terms of said agreements for the pledge thereof; to require the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and as a Member of the Board of Administration

of the State of Florida, to surrender the pledged securities now in his possession to the plaintiff herein; to require the payment to plaintiff Receiver of $3,067.50, representing the proceeds derived from the pledged collateral by the said W. V. Knott, Treasurer of the State of Florida, as Ex-Officio County Treasurer of Taylor County, and as a Member of the Board of Administration of the State of Florida; also, to require the refund to the Plaintiff Receiver of the sum of $20,759.31 heretofore paid by Plaintiff Receiver to the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, the said sum of $20,759.31 having been derived by Plaintiff Receiver in the collection of securities so pledged; the said payment of $20,759.31 derived from the proceeds of said collateral was made by Plaintiff Receiver to the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, under the misapprehension that the pledge agreements were valid and binding; that said payments and collections operated as preferential payments, preferring the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, over other general creditors; to recover a judgment against Taylor County for the amounts illegally received by W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor [fol. 4] County, for and on behalf of Taylor County, if said sums illegally received by W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, are not paid to Plaintiff; to require the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, to surrender to Plaintiff all of said pledged securities now in possession or control of said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer, and for injunctive and other relief.

(b) And against J. M. Lee, as Comptroller of the State of Florida, whose official place of business is in the State Capitol in the City of Tallahassee, in the County of Leon, State of Florida, said J. M. Lee, being a citizen and resident of Avon Park in the County of Highlands, State of Florida, and against Dave Sholtz, as Governor of the State of Florida, whose official place of business is in the State Capitol in the City of Tallahassee in the County of Leon, State of Florida, said Dave Sholtz being a citizen and resident of Daytona, in the County of Volusia, State

of Florida; and against W. V. Knott, as Treasurer of the State of Florida, whose official place of business is in the State Capitol in the City of Tallahassee in the County of Leon, State of Florida, the said W. V. Knott, being a citizen and resident of Tallahassee in the County of Leon, State of Florida;

(c) And against W. V. Knott, Treasurer of the State of Florida, as Ex-Officio County Treasurer of Taylor County, whose official place of business is in the State Capitol in the City of Tallahassee, in the County of Leon, State of Florida;

(d) And against Taylor County, a political subdivision of the State of Florida;

(e) And against the said W. V. Knott, Treasurer of the State of Florida, Dave Sholtz, Governor of the State of [fol. 5] Florida, and J. M. Lee, Comptroller of the State of Florida, as Members of and constituting the Board of Administration of the State of Florida.

III

The plaintiff alleges that the said defendant, J. M. Lee, as Comptroller of the State of Florida, Dave Sholtz, as Governor of the State of Florida, and W. V. Knott, as Treasurer of the State of Florida, are each of them more than twenty-one years of age.

IV

That the jurisdiction of this Court, both Federal and equity jurisdiction, over the parties and subject-matter of this suit and the grounds upon which said jurisdiction depends are as set out and shown in all of the paragraphs of this Bill of Complaint; that said grounds are also herein condensed and are alleged to be herein as follows:

(a) That Iron Ross, a citizen and resident of Florida, was appointed by Order of the Comptroller of the Currency of the United States, as Receiver of the First National Bank of Perry, a National Banking Corporation, existing under the Act of Congress of the United States, commonly known as the National Bank Act, the said National Bank of Perry being domiciled at Perry, Taylor County, Florida.

(b) That the names and addresses of the defendants are so far as the same are known to plaintiff as hereinbefore set forth.

(c) That equity jurisdiction of this cause is conferred by law governing the jurisdiction in chancery, this suit [fol. 6] being brought and prosecuted as aforesaid by plaintiff as Receiver of the First National Bank of Perry aforesaid in pursuance of the order and direction of the Comptroller of the Currency of the United States as aforesaid for the purpose of recovering the possession of the assets of an insolvent National Banking Corporation and is one for winding up the affairs of said National Bank, and the jurisdiction of this Court is vested under and by the terms of the provisions of Title 28 U. S. C. A. 41 (16).

(d) The matter in controversy in this suit exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00) and arises under the laws of the United States, and is brought and prosecuted by plaintiff, as an officer of the United States, in pursuance of his duties as such officer and his right and power to prosecute said suit is derived from the laws of the United States, and therefore the jurisdiction of this Court is vested under the terms and provisions of Title 28, Section 41 (1) U. S. C. A.

V

Plaintiff alleges and shows unto the Court:

(a) That the First National Bank of Perry is a National Banking Association existing under the Act of Congress, commonly known as the "National Bank Act"; that said National Bank was lawfully authorized to begin business on or about the 25th day of April, 1905, and that said Bank in pursuance of such authorization did engage in the business which it was authorized to pursue under the terms of said "National Bank Act" from said date until the day it was found to be insolvent by its Board of Directors as aforesaid and closed for liquidation in accordance with the terms of said "National Bank Act" on to-wit: the 18th day of October, 1930.

[fol. 7] (b) The plaintiff further alleges that on March 12, 1930, W. L. Weaver, as Executive Vice-President of the First National Bank of Perry, undertook to pledge with

W. V. Knott, Treasurer of the State of Florida, as County Treasurer Ex-Officio of Taylor County, Florida, $10,000.00 of the face value of the County of Sarasota 5½% Highway Bonds to be held as security for any funds deposited by the Treasurer of Florida in the First National Bank of Perry, marked Exhibit "1," and made part hereof; that while this attempted pledge was broad enough to cover any funds deposited by the State Treasurer in the said First National Bank of Perry, the real purpose of the said attempted pledge was to secure funds deposited in said Bank by W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County; the bonds in this paragraph described were delivered to the State Treasurer in pursuance of the said pledge and the said bonds or the trust receipt from the Federal Reserve Bank evidencing the ownership thereof have been continuously held in the possession of the said State Treasurer since the time of delivery of the said bonds to him.

(c) The plaintiff further alleges that on March 15, 1930 W. L. Weaver, as Executive Vice-President of the First National Bank of Perry, undertook to pledge with W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, Town of Perry bonds of the face value of $10,000.00 to secure any funds deposited by the Treasurer of Florida in the First National Bank of Perry, a copy of said pledge agreement being hereto annexed, marked Exhibit "2," and made part hereof; that while the pledge in this paragraph described was broad enough to cover any funds deposited by the State Treasurer, the real purpose of the said pledge was to secure the funds of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor [fol. 8] County; the said bonds described in this paragraph were delivered to the State Treasurer in pursuance of the pledge and the said bonds or the trust receipt from the Federal Reserve Bank evidencing the ownership thereof have been continuously held in the possession of the State Treasurer since the time of their delivery to him.

(d) The plaintiff further alleges that from time to time in 1929 and in the early part of 1930, W. L. Weaver, as Executive Vice-President of the First National Bank of Perry, pledged with the Bond Trustees of Taylor County certain securities consisting of mortgages, notes and bonds to secure funds deposited by the Bond Trustees of Taylor

County in the First National Bank of Perry; that these securities so pledged with the Bond Trustees were never delivered to the said Bond Trustees but all of said securities so pledged with the Bond Trustees were held in the physical possession of the First National Bank of Perry from the time that said pledge was made until after the Plaintiff was appointed as Receiver as hereinafter set forth.

Plaintiff further avers that on May 2, 1930 the face value of these securities pledged with the Bond Trustees of Taylor County and held in the physical possession of the First National Bank of Perry aggregated $69,549.76, and that on May 2, 1930, the Bond Trustees of Taylor County attempted to assign the contracts for the said pledges, together with the collateral so pledged to W. V. Knott, Treasurer of the State of Florida, as Ex-Officio County Treasurer of Taylor County, a copy of said assignments being hereto annexed marked Exhibit "3" and made part hereof; that all of the securities that were sought to be assigned to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County under date of May 2, 1930, continued to remain in the physical possession of the First National Bank of Perry until after the plaintiff's appointment as Receiver of said Bank.

[fol. 9] (e) Plaintiff further avers that upon plaintiff's appointment as Receiver under date of the 25th day of October, 1930, plaintiff delivered to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, the pledged bonds aggregating the face value of $20,250.00, found in the possession of the Bank which has been attempted to be assigned to the State Treasurer, as Ex-Officio County Treasurer of Taylor County, by the Bond Trustees of Taylor County as hereinbefore set forth, but the Plaintiff Receiver retained the other pledged collateral found in the possession of the Bank upon the appointment of the Receiver consisting of notes and mortgages which the Bond Trustees of Taylor County had undertaken to assign to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and the plaintiff still holds in his possession that portion of the said pledged notes and mortgages that have not been paid.

(f) Plaintiff further alleges that prior to June 25, 1930 National Banks were not authorized to secure deposits of public funds; that on June 25, 1930 there became operative

an Amendment to the National Bank Act under the provisions of which National Banks were authorized subsequent to the operative date of said Amendment to secure public deposits when empowered to do so by State laws, but the plaintiff would show that an agreement made by any National Bank prior to June 25, 1930 to secure deposits of public funds was ultra vires, illegal and void for the reasons hereinafter particularly set forth.

(g) Plaintiff Receiver would further show that since the said Bank closed on October 18, 1930 the Plaintiff Receiver of said Bank has in liquidation of said Bank and in the distribution of said assets paid to *W. V. Knott*, State Treasurer, as Ex-Officio County Treasurer of Taylor County, as a general creditor or a depositor in said Bank dividends in the sum of $13,318.03, being a dividend of [fol. 10] 19% that was paid to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer, as a general creditor of the Bank along with other general creditors.

(h) Plaintiff Receiver would further show that since the said Bank closed on October 18, 1930 the Plaintiff Receiver has collected $20,759.31 from the said pledged collateral that came into the possession of the plaintiff upon the plaintiff's appointment as Receiver and that the Plaintiff Receiver has paid over to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, the said proceeds derived from the collection of the said pledged collateral, in the sum of $20,759.31.

(i) Plaintiff Receiver would further show that the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, has since the appointment of the Plaintiff Receiver, collected the sum of $2,025.00 in interest on the portion of the said pledged collateral held by him under the said attempted pledged agreements and has undertaken to apply said sum in part payment of his claim as a depositor and creditor of said Bank.

(j) Plaintiff would further show that W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, or W. V. Knott, as Treasurer of the State of Florida, J. M. Lee, as Comptroller of the State of Florida, and Dave Sholtz, as Governor of the State of Florida, have since the appointment of the Plaintiff Receiver sold for the sum of $1,042.50, one of the bonds so undertaken to be

pledged with W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, as hereinbefore described and have undertaken to apply said sum in part payment of the claim of W. V. Knott, State Treasurer, as Ex-[fol. 11] Officio County Treasurer of Taylor County, as a depositor and creditor of said Bank.

(k) The plaintiff would further show that attached hereto as Exhibit "3½" is a list or schedule of securities now held by W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, under said attempted pledges.

(l) Plaintiff would further show that on the 18th day of October, 1930 the said First National Bank of Perry, being insolvent, suspended operations and has not since transacted banking business; that upon the closing of the said Bank, the Comptroller of the Currency of the United States of America took charge of said Bank on or about the 25th day of October, 1930, and on or about the 25th day of October, 1930 the said Comptroller of the Currency of the United States appointed the plaintiff herein as Receiver of said Bank, a copy of said Order appointing said plaintiff as Receiver is hereto annexed, marked Exhibit "4" and made part hereof; that said plaintiff thereupon took charge of the affairs of the Bank and is now the qualified and acting Receiver thereof; that this suit is brought under the laws of the United States by said plaintiff in winding up the affairs of the said Bank, the said plaintiff acting under the direction of the said Comptroller of the Currency of the United States for the purpose of winding up the affairs of the said Bank.

(m) The plaintiff further avers that the plaintiff herein, as Receiver of said National Bank as aforesaid, is by operation of law Trustee for the creditors of the said National Bank and especially the depositors thereof, which said creditors and especially the said depositors, unless relief is granted by this Court will become the innocent victims of the unlawful contracts hereinbefore alleged to have been entered into between the said officers of said National Bank [fol. 12] and the said defendant, W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and the unlawful contracts hereinbefore alleged to have been entered into between the officers of said Bank and the Board of Bond Trustees of Taylor County that were thereafter assigned to W. V. Knott, State Treasurer, as Ex-Officio

County Treasurer of Taylor County; plaintiff in this connection, alleges that said National Bank on the said 18th day of October, 1930, when the said Bank ceased operations had other private or common depositors than said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, of approximately 1,020 in number whose claims against said National Bank aggregated in excess of $336,000.00; that said Bank owed other debts and liabilities of approximately $336,263.22, making total liabilities of $336,263.22; the assets in the hands of the plaintiff are totally insufficient to pay the claims of said creditors and the said W. V. Knott, as State Treasurer of the State of Florida, Dave Sholtz, as Governor of the State of Florida, and J. M. Lee, as Comptroller of the State of Florida, are now asserting the right and privilege under the provisions of Chapter 14653, Laws of Florida, Acts of 1931, of foreclosing the said pledges and selling the securities in order to satisfy the indebtedness due W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, by reason and because of the illegal pledges hereinbefore described.

(n) The plaintiff further alleges that the said effort on the part of the officers of said National Bank to make and enter into said agreement to pledge and hypothecate the said securities was void and illegal for the following reasons:

First. That the officers of said National Bank as aforesaid were without lawful power and authority to execute said agreements for the reason that no order or action was [fol. 13] taken thereon by the Board of Directors of said National Bank, the only body authorized by law to direct or empower said officers of said National Bank to pledge and hypothecate its property to secure the payment of any debt or any obligations whatsoever.

Second. The National Bank had no power under the laws of the United States to enter into the said agreement or to make the said pledge.

Third. The said agreements and the said pledges in pursuance thereof were void and ultra vires and contrary to the public policy of the United States.

Fourth. Said agreements and said pledges in pursuance thereof created an unlawful preference in favor of said defendant, W. V. Knott, State Treasurer, of the State of

Florida, as Ex-Officio County Treasurer of Taylor County, as against other creditors of the said National Bank, and such preference is likewise void and unenforcible under the laws of the United States.

Fifth. The efforts upon the part of the said officers of said National Bank and upon the part of the said defendant, W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, to give on the one hand and to receive on the other security for the repayment of the said deposits constitutes and is a fraud upon the other creditors of the said National Bank.

Sixth. The rights of all creditors of insolvent National Banks become fixed as of the date of closing. The Act of Congress of the United States of America, approved June 25, 1930, and the Statutes of the State of Florida, could not validate a pledge which was unlawful at the time the pledges [fol. 14] were made; since the First National Bank of Perry was without power to make the pledges in question, the Plaintiff Receiver is entitled to recover said securities and/or the proceeds derived therefrom unconditionally in order that they may be administered for the benefit of the general creditors of the Bank.

Seventh. That it was illegal and ultra vires for the First National Bank of Perry to guarantee the deposits of a general creditor or a depositor of said Bank; that when the said funds were deposited in the First National Bank of Perry, said funds became intermingled with other funds of the said First National Bank of Perry and became the property of the said Bank, and the depositors became the general creditors of said Bank without security.

VII

The plaintiff would further show that the action of the plaintiff in delivering to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, the pledged collateral as hereinbefore described, the action of the plaintiff in paying over to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, the $20,759.31, being proceeds derived by plaintiff from the collection of pledged collateral as hereinbefore described, the action of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, in collecting interest from the

pledged collateral in the sum of $2,025.00 and applying the same *in part payment* of his claim against the said Bank as hereinbefore described, and the action of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, or the action of W. V. Knott, State Treasurer, J. M. Lee, State Comptroller, and Dave Sholtz, as Governor of the State of Florida, in selling one of the bonds held as col-
[fol. 15] lateral as aforesaid for the sum of $1,042.50 and applying the moneys so derived *in part* payment of the claim against the Bank as hereinbefore described were all illegal, ultra vires and void for the following reasons:

(a) That the said actions operated to prefer the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, a general creditor, over other general creditors.

(b) That said actions prevented a ratable distribution of assets between all creditors as required by law.

(c) That said actions were based upon a misapprehension or mistake of the applicable law.

(d) That said payments are preferential payments that were made under a mistake of the applicable law.

(e) That said delivery of said securities by plaintiff to defendant, W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, as hereinbefore described resulted from a mistake by plaintiff, an officer of the United States, of the applicable law.

(f) That the payment by plaintiff to defendant, W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, of the $20,759.31 derived from the collections from pledged collateral resulted from a mistake by the plaintiff, an officer of the United States, of the applicable law.

(g) That the actions of the plaintiff in paying to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, the proceeds from pledged collateral and the delivery to him of pledged collateral was based upon a misapprehension or mistake of the plaintiff, an officer of the United States, as to the legality of the pledges hereinbefore described.

[fol. 16] (h) That said actions were unauthorized; illegal and ultra vires.

(i) That all of said sums paid to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, should have been distributed ratably among the general creditors.

(j) That said securities so delivered to the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, should have been sold and the proceeds distributed ratably among the creditors of said Bank.

(k) The rights of all creditors and stockholders of insolvent National Banks become fixed as of the date of closing. Neither the Receiver of a National Bank, nor the officers of the State of Florida, or of the County of Taylor have any power to bind the creditors or stockholders by a new contract made subsequent to the date of closing of the Bank, or by altering or amending any contract made prior to the closing of the Bank or by ratifying or approving any illegal contract made prior to the closing of the Bank.

(l) That the said actions of the Receiver and said Officials of the State of Florida and the County of Taylor herein sought to be set aside would, if sustained, have the force and effect of validating or ratifying illegal contracts made prior to the date of the closing of the Bank.

(m) That neither the Receiver nor the officials of the State of Florida, or County of Taylor have any power to bind stockholders and creditors by recognizing any illegal contract made prior to the date of the closing of the Bank.

[fol. 17] VIII

Plaintiff further avers that W. V. Knott, as State Treasurer of the State of Florida, J. M. Lee, as State Comptroller of the State of Florida, and Dave Sholtz, as Governor of the State of Florida, are now threatening to proceed under the provisions of Chapter 14653, Laws of Florida, Acts of 1931, to sell the collateral now in the hands of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, under said illegal pledges and apply the proceeds in payment of the claim of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and if said officers are permitted to proceed with the sale and sell the said securities, the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of

Taylor County, will have obtained a further and additional illegal preference over the other creditors of the said Bank to the irreparable damage of the plaintiff and the general creditors of the Bank.

IX

Plaintiff would further show that the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, has been acting in the illegal transactions hereinbefore described as an officer and agent of the defendant, Taylor County, for and on behalf of defendant, Taylor County; that the defendant, Taylor County, a political subdivision of the State of Florida, has been the recipient and beneficiary of the illegal transactions hereinbefore described and has received the benefit of moneys described and set forth in said illegal transactions.

X

The plaintiff would further show that the plaintiff is informed and believes, and charges upon information and [fol. 18] belief that the said sums of money hereinbefore described as having been illegally received by W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, have been paid out to the bondholders of Taylor County by the said Board of Administration.

XI

The plaintiff would further show that the plaintiff is entitled to an injunction to jointly and severally enjoin and restrain the said defendants, W. V. Knott, as Treasurer of the State of Florida, Dave Sholtz, as Governor of the State of Florida, and J. M. Lee, as Comptroller of the State of Florida, and/or as Members of the Board of Administration of the State of Florida, from selling said pledged securities now in the possession of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and that plaintiff is likewise entitled to an injunction to enjoin and restrain W. V. Knott State Treasurer, as Ex-Officio County Treasurer, and/or the Board of Administration of the State of Florida, from asserting any claim to the pledged collateral now in the possession of plaintiff, and the plaintiff is likewise entitled to an injunction restraining the said Members of the Board of Administration from paying out any further or addi-

tional sums to the holders of the bonds of Taylor County for and on behalf of Taylor County pending this suit and/or until the sums illegally received by W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, have been paid to plaintiff.

XII

The plaintiff would further show that the said Board of Administration is organized and existing under the provisions of Chapter 14486, Laws of Florida, Acts of 1929, and other Acts amendatory thereto.

[fol. 19]

XIII

Plaintiff would further show that in order that the said dispute may be settled according to law, said comptroller of the Currency of the United States has directed the plaintiff to institute this suit in order that a judicial determination may be had between the parties hereto and that a correct disposition may be made of the dispute between the parties.

Wherefore, the premises above considered, the plaintiff being without remedy, save in a Court of Equity, plaintiff prays that the defendant, W. V. Knott, as Treasurer of the State of Florida, Dave Sholtz, as Governor of the State of Florida, and J. M. Lee, as Comptroller of the State of Florida, may be jointly and severally temporarily enjoined, as Members of the State Board of Administration, or otherwise, pending the final determination of this cause, from selling under the provisions of Chapter 14653, Laws of Florida, or otherwise, any of the said securities; that the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, may be temporarily enjoined, pending the final determination of this suit, from delivering any of the said securities now in his possession or control, to the defendant, Taylor County; that pending this suit, the defendant, W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and/or the said Members of the said Board of Administration may be enjoined from asserting any right to the possession of the pledged collateral now in the hands of the plaintiff, and from paying out any moneys to the holders of the bonds of Taylor County, pending this suit; that upon final

hearing, the said injunctions herein sought may be permanent and perpetual; that upon final hearing, it may be decreed that the agreements under which the said collateral was pledged and the assignment thereof may be declared null and void; that the defendant, W. V. Knott, State [fol. 20] Treasurer, as Ex-Officio County Treasurer of Taylor County, may be required to surrender to plaintiff that part of the pledged collateral now in his possession in order that the same may be sold and that the proceeds of sale may be distributed ratably among the general creditors of said Bank, that the action of plaintiff in delivering to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, a part of said pledged collateral be declared to be illegal; that the action of the plaintiff in paying over to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, the sum of $20,759.31 derived from the collections made by plaintiff from pledged collateral be declared illegal; that the action of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, in collecting interest on pledged collateral in the sum of $2,025.00 and applying the same in part payment of his claim against the Bank be declared to be illegal; that the action of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and/or the action of the said W. V. Knott, as State Treasurer, J. M. Lee, as State Comptroller, and Dave Sholtz, as Governor of the State of Florida, in selling one of the said bonds held under the illegal pledge for the sum of $1,042.50 and applying the proceeds in part payment of said claim against the Bank be declared illegal; that the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and the said Board of Administration of the State of Florida may be required to pay over to plaintiff $23,826.81 that may be hereafter received by the Board of Administration for and on behalf of the holders of the bonds of Taylor County for the Purpose of compensating plaintiff for the moneys of the plaintiff that were illegally received by the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and paid out by the Board of Administration as [fol. 21] hereinbefore set forth in the sum of $23,826.81; or that this plaintiff may be subrogated to the rights of the holders of the bonds of Taylor County to future payments by the Board of Administration to such bondholders

in an amount sufficient to compensate this plaintiff for moneys illegally received by W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and paid out to bondholders of Taylor County by the Board of Administration to compensate this plaintiff for moneys illegally received and disbursed as hereinbefore set forth in the sum of $23,826.81; or that the plaintiff may have and recover a final judgment and decree for $23,826.81 of and from Taylor County for whose use and benefit said moneys were illegally received and disbursed; that the plaintiff may be authorized to offset against any future dividends that may be payable in the administration of said trust to said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, said sums so illegally received by the said defendant, W. V. Knott, in his official capacity; that the plaintiff may be allowed lawful interest upon any sums which he may recover; and, if plaintiff has prayed for improper relief, he prays for such other, further and general relief as equity may deem fit and proper.

That your Honor may grant unto the plaintiff the State's most gracious writ of subpoena directed to the defendants specified in this Bill of Complaint; that each and every of said defendants may be required in and by said subpoena, or other process, to appear before this Court on a day to be fixed by this Court and to answer this Bill of Complaint, but not under oath, answer under oath being hereby expressly waived, and plaintiff may have such other relief as to your Honor may seem meet and equity may require; and that in all cases where no answer has been filed on or before the time for filing same as required by the practice, [fol. 22] or if answer is filed and this cause shall be decided for plaintiff, that then this Honorable Court may by its decree grant the relief herein prayed or such other relief as to your Honor may seem meet and equity may require.

Iron Ross, As Receiver of the First National Bank of Perry, a Corporation under the National Banking Laws. J. Turner Butler, Attorney for Plaintiff.

Duly sworn to by Iron Ross. Jurat omitted in printing.

[fol. 23]

EXHIBIT "1" TO BILL OF COMPLAINT

State of Florida, Office of State Treasurer, Tallahassee

March 12, 1930.

Received of First National Bank, Perry, Florida, the following bonds, the same to be held as security for any funds deposited by the Treasurer of Florida in the said First National Bank, Perry, Florida, to-wit:

Description of Securities	Trust Receipt No.	Int. Payable	Date of Issue	Amount
County of Sarasota 5½% Highway Bonds dated February 1, 1925, due February 1, 1945, with August 1, 1930 and SCA.....	Jax 1958	F&A		10,000.00

(Sgd.) W. V. Knott, State Treasurer and as County Treasurer Ex-Officio.

[fol. 24]

EXHIBIT "2" TO BILL OF COMPLAINT

State of Florida, Office of State Treasurer, Tallahassee

March 15, 1930.

Received of First National Bank, Perry, Florida, the following bonds, the same to be held as security for any funds deposited by the Treasurer of Florida in the said First National Bank, Perry, Florida, to-wit:

Description of Securities	Trust Receipt No.	Int. Payable	Date of Issue	Amount
Town of Perry 6% Sewer Bonds with July 1, 1930 & SCA. Dated 1-1-1926. One bond due each year from Jan. 1940 to 1949 inclusive. Ten @ $1,000.00 each.....	Jax 1992	J&J		$10,000.00

(Sgd.) W. V. Knott, State Treasurer and as County Treasurer Ex-Officio.

[fol. 25] EXHIBIT "3" TO BILL OF COMPLAINT

Perry, Florida, May 2, 1930.

Received of the Board of Bond Trustees of Taylor County, Florida, the following described notes, mortgages and bonds to be held in trust for them, it being understood by and between this bank and the said Board of Bond Trustees that the securities described are pledged with the said Board of Bond Trustees by the bank for the purpose of securing deposits to the credit of said Board of Bond Trustees in Interest and Sinking Fund accounts. It is understood by and between the parties hereto that this bank is to segregate and hold assets of the bank and same to be released to the bank only by and with the consent of said Board of Bond Trustees, their successors, or assigns, so long as said funds remain on deposit.

Note # 24046 signed by A. V. Weaver and indorsed by T. L. Weaver, dated January 1, 1930, interest at 8% from date $5,000.00

Note # 23943 signed by E. S. Conner and secured by 15 shares capital stock of First Nat. Bank of Live Oak, Fla. certificate attached, due July 15, 1930 ..... 3,000.00

The following first mortgage notes, mortgages attached:

Maud C. Calhoun	# 24090	due 3/7/31	4,925.37
T. J. Faulkner	23495	5/20/30 Pd. 10/2 $302.40	

[fol. 26]

W. A. Hendry	23964	7/15/30	2,500.00
W. T. Hendry	23904	6/1/30	2,750.00
Clara B. Kelly	23781	2/20/31	1,984.47
R. D. Peacock	22773	12/10/30	7,240.18
Geo. E. Porter	24114	11/2/30	9,450.00
Edgar Smith	24126	4/15/31	2,282.04

19

J. A. Vickrey	23517	9/3/30 Pd. 9/24 $144.00	1,000.00	
J. H. Parker	24030	10/15/30	5,000.00	
				49,299.76
Bond # 80, City of Waycross, Georgia				1,000.00
Bonds of Perry Masonic Lodge Nos. 41, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 90, 97, 98, 147, 150, 170, 178, 179, 148, 180, 186, 187, 188, 190, 193, 211, 212, 213				4,250.00
Perry Hotel Company Bonds Nos. 75, 80, 86, 88, 92, 93, 108, 122, 125, 130, 131, 133, 134, 135, 136, 137, 138, 139, 147, 132, 148, 149, 150, 152, 186, 187, 188, 189, 204, 213, 214, 151, 162, 227, 246, 251, 255				15,000.00
				69,549.76

The First National Bank of Perry, Fla., by W. L. Weaver, Vice-President.

[fol. 27]

We hereby assign, transfer, and set over to W. V. Knott, State Treasurer, and as County Treasurer Ex-Officio for Taylor County, Florida, the notes, mortgages and bonds described above.

Board of Bond Trustees for Taylor County, Florida, A. C. Kerby, J. H. Parker, G. H. Warren.

Exhibit "3½" to Bill of Complaint

Items of collateral held by W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, under pledge by First National Bank of Perry.

Asset	Name or Description	Original Amount	Balance of Principal	
621	Perry, Fla. 6% Sewer Bonds.....	$10,000.00	$10,000.00	Pledged March 15, 1930.
630	Sarasota Co. 5½% Hy. Bonds.....	10,000.00	10,000.00	Pledged March 12, 1930.
[fol. 28]				
623	Perry Hotel Co. 7% Bonds.....	15,000.00	15,000.00	Pledged with Bond Trustees of Taylor Co. and assigned to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor Co., May 2, 1930.
624	Perry Lodge #123 F. & A. M. 7% Bonds.....	4,250,000	4,250,000	Pledged with Bond Trustees of Taylor Co. and assigned to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor Co., May 2, 1930.

[fol. 29] EXHIBIT "4" TO BILL OF COMPLAINT

No. 7865

Treasury Department, Office of Comptroller of the Currency

Washington, D. C., October 25, 1930.

Whereas, from information on file in this bureau, I am satisfied the "The First National Bank of Perry," located in the Town of Perry, County of Taylor, and State of Florida is insolvent and unable to pay its just and legal debts:

Now, Therefore, I, J. W. Pole, Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of Section 1 of an Act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks, and for other purposes," approved June 30, 1876, do hereby appoint Iron Ross, Receiver of "The First National Bank of Perry" with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

In Witness Whereof, I have hereto subscribed my name, and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twenty-fifth day of October, A. D. 1930.

J. W. Pole, Comptroller of the Currency. (Seal.)

Received Dec. 11, 1935.

[fol. 30] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS

[Title omitted]

Comes now Taylor County, Florida, a political subdivision of the State of Florida, and files its several motion to dismiss the bill of complaint in this cause filed, and for grounds of said motion says:

1. Said Bill states no grounds for equitable relief.

2. The bill of complaint shows no jurisdiction in this Court over this cause.

3. The bill of complaint shows on its face that the pledge agreement were valid and binding.

4. The bill of complaint fails to show fraud upon creditors of said Bank, but sets up mere conclusion of the pleader.

5. The Bill of Complaint fails to show sufficient facts to warrant setting aside said agreements.

6. The Bill of Complaint fails to set up facts which show that said pledges were void when made, but merely draws conclusions.

7. The Bill of Complaint fails to show that plaintiff is the proper party to institute this suit.

8. The Bill of Complaint fails to show facts sufficient to establish an illegal preference.

9. The Bill of Complaint shows that said pledges became valid and binding even if they were originally ultra vires.

[fol. 31] 10. The Bill of Complaint fails to show that W. L. Weaver, in his official capacity in said Bank, had no authority to enter into the pledges on behalf of the Bank.

11. The Bill of Complaint affirmatively shows that the said Bank and its officials and the plaintiff in this case recognized and acted under said pledges after being authorized by law to do so.

12. All allegations of said Bill of Complaint with reference to lack of authority in said Bank to make pledges set forth constitute mere conclusions of pleader.

13. The allegations of the Bill of Complaint show that all the pledges were ratified and confirmed by the parties hereto in due course prior to and after the insolvency of said Bank.

14. It is affirmatively shown that if there was fraud in connection with said pledges it was solely upon the side of said Bank and not upon the part of any defendant.

It is respectfully prayed that said Bill of Complaint be dismissed as to this defendant upon the grounds set forth.

T. J. Swanson, Attorney for Taylor County, Florida.

Received Jan. 30, 1936.

[fol. 32] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS

[Title omitted]

Come now W. V. Knott, as Treasurer of the State of Florida; W. V. Knott, Treasurer of the State of Florida, as Ex-Officio County Treasurer of Taylor County, Florida; Dave Sholtz, as Governor of the State of Florida; J. M. Lee, as Comptroller of the State of Florida; and W. V. Knott, Treasurer of the State of Florida, Dave Sholtz, Governor of the State of Florida, and J. M. Lee, Comptroller of the State of Florida, as members of and constituting the Board of Administration of the State of Florida, and file this their joint and several Motion to Dismiss the Bill of Complaint heretofore filed herein against them and each of them, and for grounds of the said motion say:

1. That the said Bill of Complaint is without equity.

2. That the said Bill of Complaint states no sufficient facts to warrant the relief therein prayed against these defendants or either of them.

3. That it affirmatively appears from the allegations of said Bill of Complaint, that the alleged pledge agreements therein sought to be set aside and declared null and void, are valid, subsisting, and binding agreements, and that there is no sufficient reason in law for the interposition of the jurisdiction of a Court of Equity to set the same aside.

4. That the said Bill of Complaint sets forth no sufficient facts to show that said agreements should be set aside, but merely states the conclusions of the pleader in that regard.

[fol. 33] 5. That said Bill of Complaint shows on its face that this Court is without jurisdiction in the premises.

6. That said Bill of Complaint sets forth no sufficient allegations to show that plaintiff is a proper party to bring said suit.

7. That said Bill of Complaint contains no sufficient allegations to show that W. L. Weaver, as Executive Vice-President of the First National Bank of Perry, was without

authority on behalf of said bank, to make and enter into the pledges in said Bill of Complaint sought to be set aside.

8. That said Bill of Complaint affirmatively shows from the allegations thereof, that said pledges were in terms sufficiently broad to cover any funds deposited by the Treasurer of the State of Florida in said First National Bank of Perry, and affirmatively shows that the bonds therein referred to were delivered in pursuance of said pledges, and in recognition thereof.

9. That the allegations of said Bill of Complaint set forth no sufficient facts to show any lack of authority in said First National Bank of Perry to make the pledges in said Bill of Complaint set forth, but the allegations in that regard constitute conclusions of the pleader.

10. That the allegations of the Bill of Complaint affirmatively show that said pledges as made were acted upon by the parties thereto and by the plaintiff in this suit.

11. That it appears from the allegations of said Bill of Complaint that if said pledges were ultra vires when made, they were subsequently and prior to the insolvency of said bank, ratified and confirmed by the parties thereto; and further, since the insolvency of said bank, ratified and confirmed by this plaintiff.

[fol. 34] 12. That it affirmatively appears from the allegations of the Bill of Complaint that said pledges, if originally ultra vires, became and were valid and binding on and after the 25th day of June, 1930.

13. That the Bill of Complaint sets forth no sufficient facts to show that said pledges constitute any illegal preference, but the allegations with respect thereto consist of conclusions of the pleader, and present no issuable allegations of fact.

14. That said Bill of Complaint contains no sufficient issuable allegations of fact to show that said pledges were void when made, or that they were or are contrary to the public policy of the United States.

15. That the allegations of said Bill of Complaint set forth no facts to show any fraud upon the creditors of said

national bank, but constitute mere conclusions of the pleader.

16. That the Bill of Complaint sets forth no issuable allegations of fact requiring the answer of these defendants or of either of them.

Wherefore, it is respectfully submitted that said Bill of Complaint should be dismissed as to these defendants, and each of them, moving therefor.

Cary D. Landis (W), Attorney General; H. E. Carter (W), Assistant Attorney General; James B. Watson, Assistant Attorney General, Attorneys for the Defendants in said Motion Mentioned.

Received Jan. 3, 1936.

[fol. 35] IN UNITED STATES DISTRICT COURT

ADDITIONAL GROUNDS OF MOTION TO DISMISS; AND SUPPLEMENTAL MOTIONS TO DISMISS PARTS OF BILL—Filed February 20, 1936

[Title omitted]

Come now W. V. Knott, as Treasurer of the State of Florida; W. V. Knott, Treasurer of the State of Florida, as Ex-Officio County Treasurer of Taylor County, Florida; Dave Sholtz, as Governor of the State of Florida; J. M. Lee, as Comptroller of the State of Florida; Taylor County, a political subdivision of the State of Florida; and W. V. Knott, Treasurer of Florida, Dave Sholtz, Governor of Florida, and J. M. Lee, Comptroller of the State of Florida, as members of and constituting the Board of Administration of the State of Florida, defendants herein, before hearing on the Motion to Dismiss the Bill of Complaint heretofore filed herein, and by leave of Court first had and obtained, jointly and severally file these their Additional Grounds of said Motion to Dismiss and their Supplemental Motions to Dismiss the Bill of Complaint, insofar as particular parts thereof, as hereinafter stated, are concerned.

And for additional grounds of said Motion to Dismiss, heretofore filed herein, the said defendants jointly and severally say:

A

(17) That the said Bill of Complaint is multifarious, and seeks relief to which the plaintiff is not entitled.

(18) That it affirmatively appears that the Act of Congress of June 25, 1930, (Chapter 604, 46 Stat. at L. 809, U. S. C. Title 12, Sec. 90) which amends Section 45 of the [fol. 36] National Bank Act of 1864 (Act of June 3, 1864, Chapter 106, Sec. 8, 13 Stat. at L. 101, R. S. Sec. 5136, U. S. C. Title 12, Sec. 24, Seventh) is curative in its effect, and, it affirmatively appearing from facts of which the Court will take judicial notice, that the laws of Florida authorized and required such pledges, the said Act of Congress operates to validate said pledges and pledge agreements, and to make lawful and legal in every respect, the transactions had thereunder, from the respective dates of the making thereof.

(19) That it affirmatively appears that said Act of June 25, 1930, considered in the light of facts of which the Court will take judicial notice, is curative in its effect, and operates to validate said pledges and pledge agreements, and the transactions had thereunder, from and after June 25, 1930, as to any and all deposits of public funds of the State of Florida, or any of its political subdivisions, remaining on deposit with said bank on and after said June 25, 1930.

(20) That it affirmatively appears that, under and by said pledge agreements, it was contemplated that there would be continuous dealings between the parties thereto so long as, and to the extent that, moneys should be deposited with said bank and should remain on deposit; and that throughout such period of time, the parties intended and supposed that a lien should exist and be operative upon the pledged assets of said bank; and that upon the passage by Congress of the Act of June 25, 1930, amending Section 45 of the National Bank Act, any and all obstacles to the legality and operation of any lien upon said pledged assets, were removed; and that thereafter, the original pledge agreements, and the assignments thereof, could, as to the future, be given the effect intended by the parties; and the liens of said pledge agreements intended and contemplated by the parties, became operative as to moneys there- [fol. 37] after left on deposit with said bank.

B

And said defendants further jointly and severally move the Court to dismiss the Bill of Complaint heretofore filed herein, insofar as the said Bill of Complaint seeks to restrain these defendants, or either of them, from the sale of securities under the provisions of Chapter 14,653, Laws of Florida. And for grounds of said motion, said defendants say:

(1) There is no equity in the Bill of Complaint entitling the plaintiff to such relief.

(2) It affirmatively appears that said securities so held by the defendants, or either of them, are held under and by virtue of a valid and subsisting lien.

C

And said defendants jointly and severally move the Court to dismiss the Bill of Complaint heretofore filed herein, insofar as said Bill prays injunctive relief against delivery by the defendants, or either of them, of any of the pledged securities in said Bill of Complaint described, to Taylor County, Florida; and for grounds of said motion, said defendants say:

(1) There is no equity in the Bill of Complaint, entitling the plaintiff to such relief.

(2) Such relief is improper and should not be granted upon the showing made by plaintiff.

(3) It affirmatively appears that said defendants are holding said securities under a valid claim of right, and a [fol. 38] valid and existing pledge, and that they may assert the same to the extent allowed by law.

D

And said defendants jointly and severally move the Court to dismiss the Bill of Complaint herein, insofar as said Bill seeks to enjoin these defendants, or either or any of them, from asserting any right to the possession of the pledged collateral in said Bill of Complaint described. And for grounds of said motion said defendants say:

(1) That there is no equity in the Bill of Complaint, entitling the plaintiff to such relief.

(2) That such relief, so prayed, is improper.

(3) That it affirmatively appears that said defendants are holding the pledged collateral under a valid claim of right, for the purposes for which the same was pledged.

E

And said defendants further jointly and severally move the Court to dismiss the Bill of Complaint herein, insofar as said Bill of Complaint seeks to enjoin said defendants, or any or either of them, from paying out any moneys to the holders of bonds of Taylor County, Florida; and for grounds of said motion, said defendants say:

(1) That there is no equity in said Bill of Complaint, entitling the plaintiff to the relief so prayed.

(2) That it affirmatively appears from the Bill of Complaint that, insofar as such relief is sought, the rights of [fol. 39] holders of bonds of Taylor County, Florida, are involved; and it further affirmatively appears that before such relief may be granted, said holders of bonds, thereby sought to be affected, are necessary parties; and it further affirmatively appears that said holders of bonds thus sought to be affected in their rights, are not parties to this proceeding.

F

And the said defendants further jointly and severally move the Court to dismiss the Bill of Complaint herein, insofar as said Bill seeks to require the surrender to the plaintiff of the pledged securities therein described, in the possession of the defendant Knott, State Treasurer, as County Treasurer Ex-Officio of Taylor County. And for grounds of said motion, said defendants say:

(1) That it affirmatively appears from the allegations of the Bill of Complaint, that plaintiff is not, in equity, entitled to such relief.

(2) That it affirmatively appears from the allegations of the Bill of Complaint that said defendant Knott, in said capacity, has, in equity, a right to hold said securities so coming into his possession.

G

And said defendants further jointly and severally move the Court to dismiss the said Bill of Complaint, insofar as

said Bill seeks to have the action of the plaintiff, in paying to said Knott a part of the pledged collateral, in said Bill described, declared illegal. And said defendants, as grounds for said motion, say:

(1) There is no equity in said Bill of Complaint, entitling the plaintiff to such relief.

[fol. 40] (2) That it affirmatively appears from the allegations of the Bill of Complaint, and other facts of which the Court will take judicial notice, that the plaintiff, upon appointment as Receiver of said bank, was charged with notice of the matters and things appearing in the files of said bank, with respect to such pledge agreements; that the payment by the said plaintiff to said Knott, of the sums of money in said Bill of Complaint referred to, and the delivery by said plaintiff to said Knott, of the collateral therein described, were made and done respectively under a claim of right subsisting in, and then being asserted by, said Knott; and that such payment was made, and such delivery was accomplished by said plaintiff, with full notice of all of the matters and things concerning or pertaining to said pledge agreements.

H

And said defendants further jointly and severally move the Court to dismiss said Bill of Complaint, insofar as it seeks to have the action of the defendant Knott, State Treasurer, as County Treasurer Ex-Officio of Taylor County, Florida, in collecting interest on pledged collateral, and applying the same in part payment of his claim, declared illegal. And for grounds of said motion, these defendants say:

(1) That there is no equity in the Bill of Complaint, entitling the plaintiff to the relief so prayed.

(2) That it affirmatively appears from the allegations of the Bill of Complaint, that any and all collections of interest by said defendant, on pledged collateral, were made under claim of right, and under and by virtue of valid and existing pledges; and it further affirmatively appears that said interest, when so collected, was properly applied by said defendants toward the payment of his said claim.

[fol. 41] I

And said defendants further jointly and severally move the Court to dismiss the said Bill of Complaint, insofar as said Bill seeks to have the alleged actions of these defendants, or any or either of them, in selling one or more of said bonds, declared illegal. And for grounds of said motion, these defendants say:

(1) That there is no equity in said Bill of Complaint, entitling the plaintiff to the relief so prayed.

(2) That it affirmatively appears from the allegations of said Bill of Complaint, that the sale by said defendants, or any or either of them, of any bonds pledged under said pledge agreements, was made pursuant to the terms of said pledge, and that such action on their part was legal and authorized under the law.

J

And said defendants further jointly and severally move the Court to dismiss the Bill of Complaint herein, insofar as said Bill of Complaint seeks to have these defendants, or either of them, pay to the plaintiff the sum of $23,826.81, or any other sum, that may hereafter be received by said Board of Administration, for and on behalf of the holders of bonds of Taylor County, Florida. And for grounds of said motion, these defendants say:

(1) That there is no equity in said Bill, entitling the plaintiff to such relief.

(2) That it affirmatively appears from the allegations of said Bill of Complaint, that the holders of bonds of Taylor County, Florida, are necessary parties to any proceeding [fol. 42] whereby, and wherein, such relief is sought; and it further affirmatively appears that said holders of bonds of Taylor County, Florida, are not parties to this proceeding.

(3) That the said Bill of Complaint, in this respect, is vague, indefinite, and uncertain, and makes no clear showing of any right to such relief.

K

And said defendants further jointly and severally move the Court to dismiss the said Bill of Complaint, insofar as

the same prays that the plaintiff be subrogated to the rights of any holders of bonds of Taylor County, Florida, to any future payments to said holders, by the Board of Administration. And for grounds of said motion, said defendants say:

(1) That it affirmatively appears from the allegations of said Bill, that there is no equity therein, entitling the plaintiff to such relief.

(2) That it affirmatively appears from the allegations of said Bill of Complaint, that said bondholders of Taylor County, Florida, are not made parties thereto; and it appears that such bondholders are necessary parties to any proceeding wherein, or whereby, their rights to future payments at the hands of the Board of Administration, are sought to be affected.

L

And said defendants further move the Court to dismiss said Bill of Complaint, insofar as the same prays that the plaintiff have and recover final judgment and decree in the sum of $23,826.30, or any other sum, against Taylor [fol. 43] County, Florida. And for grounds of said motion, these defendants say:

(1) That there is no equity in the Bill of Complaint, entitling the plaintiff to such relief.

(2) That such relief is inconsistent with relief, elsewhere in said Bill of Complaint, prayed.

M

And said defendants further jointly and severally move the Court to dismiss the Bill of Complaint herein, insofar as said Bill prays that the plaintiff may be authorized to offset against any further dividends payable in the administration of the assets of said First National Bank of Perry, to the defendant Knott, in any of his aforesaid capacities. And for grounds of said motion, these defendants say:

(1) That it affirmatively appears that there is no equity in the Bill of Complaint, entitling the plaintiff to such relief.

(2) That such relief is improper.

N

And these defendants further jointly and severally move the Court to dismiss the Bill of Complaint herein, insofar as said Bill prays that the plaintiff may be allowed interest upon any sums of money which he may recover herein. And for grounds of said motion, these defendants say:

(1) That it affirmatively appears from the allegations of said Bill of Complaint, that there is no equity therein, entitling the plaintiff to such relief.

[fol. 44] (2) That it affirmatively appears from the allegations of said Bill of Complaint, that the Bill is, in that regard, vague, indefinite, and uncertain, and that it is impossible, from a reading of that portion of the same, to determine the relief which is prayed.

(3) That it affirmatively appears from the allegations of said Bill of Complaint, that the plaintiff is not entitled to recover any sums in and by this action.

Wherefore, these defendants, so moving, by their undersigned attorneys, respectfully move the Court to dismiss the Bill of Complaint, as a whole, upon the grounds hereinabove set forth, and as to the particular parts thereof, upon the grounds hereinabove likewise set forth.

Cary D. Landis (W), Attorney General; H. E. Carter (W), Attorney General; James B. Watson, Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

This cause is before the Court on motion of the defendants, Knott, as Treasurer of the State of Florida, as Ex-Officio Treasurer of Taylor County, Florida, Dave Sholtz as Governor and J. M. Lee as Comptroller; and upon mo-

tion of Taylor County, Florida, a political subdivision of the State of Florida, to dismiss the Bill of Complaint filed herein.

It appears from the Bill of Complaint that in the latter part of the year 1929 and in the early part of the year 1930, [fol. 45] the First National Bank of Perry pledged with the Bond Trustees of Taylor County, Florida, certain securities which aggregated the face value of some $69,500.00, and that thereafter the said Bond Trustees assigned the agreement and pledged securities to the defendant, Knott, who was at the time State Treasurer, and as such Ex-Officio Treasurer of Taylor County, Florida. It further appears that the Bank, through its officers, pledged bonds on March 12, 1930, in the sum of $10,000.00 to secure funds deposited by the said Knott, State Treasurer, as County Treasurer Ex-Officio; and that, on March 15, 1930, the Bank pledged $10,000.00 of Town of Perry bonds with Knott in said capacity to secure funds deposited with said Bank.

In the latter part of October, 1930, the Bank failed; and the plaintiff, Ross, was appointed Receiver and as such Receiver paid to the defendant, Knott, State Treasurer as County Treasurer Ex-Officio, some $20,000.00 derived by him in the collection of securities which had been pledged with the Bond Trustees and left with the Bank. Sometime afterwards the said defendant, Knott, derived some $3,000.00 from the balance of pledged collateral which was in his hands.

It is contended that these pledge agreements were ultra vires and void when made, because prior to June 25, 1930, National Banks had no power to pledge their assets to secure deposits of public funds of states, or their political subdivisions; because, at the time of the execution of said agreements, they were illegal and contrary to the public policy of the United States; and because they operate to prefer the defendants over common depositors.

As to the securities paid over and delivered by the Receiver himself, it is contended that such payment and delivery was made under misapprehension as to the applicable law; and that they should be recovered because such pay- [fol. 46] ment was illegal, preferential, and a fraud upon creditors.

The motions to dismiss set up a number of grounds which squarely present the question of the validity of the pledges

as to unpaid balances remaining on deposit after June 25, 1930, upon the determination of which question the Bill must stand or fall.

On the 25th day of June, 1930, the Act of Congress amending the provisions of the National Banking Act became effective; and this amendment permitted National Banks to give security for the safe-keeping and prompt payment of such money as is here involved of the same kind as is authorized by the law of the State in which the Bank is located. Prior to the passage of this Act, National Banks were without authority to pledge their assets as security for the safe-keeping and prompt payment of public moneys of States, and their political subdivisions, deposited with them.

At the time of the deposit on the part of the Treasurer and of the execution of the agreements by which the Bank pledged the security, the Florida Law permitted banks to pledge their assets as security for the safe-keeping and prompt payment of such deposits of public funds. At such time the National Bank was without authority; but after the Amendment of June 25, 1930, National Banks were authorized to make such pledges as security for such deposits, and, when the Amendment became effective, there was in the hands of the Bank a balance due to the defendant, Knott, as State Treasurer and Ex-Officio County Treasurer, which balance was secured by collateral placed in his hands prior to the amendment of the National Banking Act. The First National Bank of Perry continued to do business until the latter part of October, 1930, several months subsequent to the Amendment of June 25, 1930. During this period, the Bank made no effort to withdraw its pledged security; but, in order to retain the unpaid bal- [fol. 47] ance of the deposit made prior to the Amendment, permitted its security to remain pledged to secure such balance due, at a time when the State law required, and the National Banking Act permitted, such security to be given.

While the facts are not the same, the case of Lewis, Receiver v. Fidelity & Deposit Company of Maryland, 292 U. S. 559, 54 S. Ct. 848, 78 L. Ed. 1425, 92 A. L. R. 794, decided June 4, 1934, presented a question which is quite similar to that in the case at bar. In that case a National Bank had qualified as a public depositary under the laws of the State of Georgia, which required bond in double

the amount of the deposits. The Fidelity Company was surety on the bond involved, which was executed in 1928. The Georgia law then provided that, upon the giving of such bond there should arise and be created a general lien upon all of the assets of the bank, both those presently held and those thereafter to be acquired. Deposits were made; and at the time of the passage of the Amendment of June 25, 1930 there was a balance on hand due the depositor, which balance was withdrawn soon thereafter. Later, between June 25, 1930, and the appointment of the Receiver in 1932, deposits were regularly made and aggregated a large sum. The unpaid balance on hand at the time of the appointment of the Receiver the Fidelity Company paid, taking an assignment of the rights of the depositor against the Bank. No bond, other than the original 1928 bond, was ever given. The Supreme Court of the United States held that when the bond was originally given it was ineffective to create a lien; but that when the legal obstacle to the lien was removed by the Amendment of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties, and the lien became operative as to the deposits thereafter made. Consequently, the Fidelity Company was held entitled to assert the lien as against the general assets of the bank in the hands of the Receiver.

[fol. 48] In the case at bar, the Florida Laws permitted the pledging of securities by banks and a continuing agreement was entered into by the Treasurer with the First National Bank of Perry, which agreement was that the Treasurer would deposit money, and would recognize that bank as a public depository. These securities were pledged for the safekeeping and prompt payment by the Bank of these deposits. Thus far, the only distinction between the Lewis case and the instant case is that there a general lien was provided upon the giving of bond, while in the case at bar a specific lien was contemplated upon the securities pledged with the State Treasurer. After the adoption of the Amendment of June 25, 1930, it is true that no deposits were made by the State Treasurer in the instant case, but there was a balance on deposit which remained due and unpaid until the Bank closed its doors in the latter part of October, 1930. It is true, according to the allegations of the Bill, that the State Treasurer made no further deposits and that he did not call on the Bank to

repledge its securities, but that he contented himself with the security pledged prior to the Amendment; but it is likewise true that the legislatively established public policy of the State of Florida required security to be taken for such deposits, and after June 25, 1930 National Banks were authorized to give it. Moreover, on June 25, 1930, and thereafter such security was held under the pledge agreements set up in the Bill.

Deposits in a Bank create but one liability, that of debtor and creditor; and to say that the pledging of the security before the Amendment was null and void and inoperative to protect a balance in the hands of the Bank after the obstacle, which prevented an effective original pledge, was removed and the original agreement could be given the effect intended, would in the instant *case he to allow* the Bank to continue to hold unpaid balances, having theretofore [fol. 49] delivered security, at a time when the State law in effect required, and the Federal law authorized, security to be given. To say that the original agreement of the parties may be given the effect intended as to deposits made after June 25, 1930, but not as to unpaid balances remaining on deposit after that date is to sacrifice equitable principles upon *the altar of tenuous distinctions.* In each situation the relation of the Bank and the depositor is the same, that of debtor and creditor. It is hardly to be presumed that, in order to make the unpaid balance a deposit for which the security would be liable, it would be necessary for the Treasurer to have appeared at the bank window, give his check for the unpaid balance; and the next moment, deposit it. In the Lewis case, the Supreme Court said:

"* * * It appears that the balance on hand June 25, 1930 was withdrawn soon thereafter; that between June 25, 1930, and the appointment of the receiver, May 23, 1932, deposits were regularly made aggregating a large sum; that from time to time checks were drawn against these deposits; and that all of the balance in bank when the receiver was appointed represented deposits made after the passage of the Act. The appointment of the bank as depository in 1928 and the bond were to cover a period of four years. Though the lien was in form security for the bond, the extent of liability was to be measured by the unpaid balance. Thus, the transaction was not com-

pleted in 1928; it was contemplated that there would be continuous dealings between the parties for four years. In fact, the relation continued until the appointment of the receiver. Throughout the whole period the parties intended that the lien should be operative and supposed that it was. The appointment was within the power of the State to confer and of the bank to accept, but by reason of the paramount federal law one of the anticipated incidents of the relation, the lien, could not arise. When that obstacle [fol. 50] was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties; and the lien became operative as to deposits thereafter made and is entitled to priority from the date of the Act. A statute is not retroactive merely because it draws upon antecedent facts for its operation • • • "

For reasons above stated, these motions to dismiss will be granted and the Bill of Complaint dismissed.

Done and Ordered in Chambers, at Pensacola, Florida, this 29 day of February, A. D. 1936.

A. V. Long, United States District Judge.

Received Mar. 1, 1936.

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

Equity. No. 21

IRON ROSS, as Receiver of the First National Bank of Perry, a Corporation under the National Banking Laws, Plaintiff,

vs.

W. V. KNOTT, as Treasurer of the State of Florida et al., Defendants

FINAL DECREE

This cause coming on to be heard upon the motion of the defendants, W. V. Knott, as Treasurer of the State of Florida, as Ex-Officio Treasurer of Taylor County, Florida, Dave Sholtz as Governor, and J. M. Lee as Comp-

troller; and upon motion of Taylor County, Florida, a po-
[fol. 51] litical subdivision of the State of Florida, to dismiss the bill of complaint filed herein,—and the same having been argued by counsel for the respective parties;

It Is Considered by the Court that the said motions and each of them be and the same are granted, and the said bill of complaint dismissed, for the reasons stated in the opinion filed herein.

Done and Ordered in Pensacola, Florida, this the 29th day of February, A. D. 1936.

A. V. Long, District Judge.

Received Mar. 2, 1936.

In United States District Court

[Title omitted]

Petition for Appeal—Filed April 23, 1936

Comes now Plaintiff, by his undersigned attorney, and feeling himself aggrieved by the Final Decree of this Court entered herein on the 29th day of February, 1936, dismissing the Complainant's Bill of Complaint, hereby prays that an appeal may be allowed to plaintiff from said final decree to the United States Circuit Court of Appeals, in and for the Fifth Circuit, made returnable on the 21st day of May, 1936.

The plaintiff would further show that said appeal is taken by direction of the Treasury Department, Comptroller of the Currency, as will appear from the direction of George P. Barse, General Counsel, Comptroller of the Currency, approved, Gibbs Lyons, Deputy Comptroller, dated April 4, 1936, hereto annexed, marked Exhibit "A" and made part hereof.

[fol. 52] The plaintiff presents herewith his assignment of errors, copy of which has heretofore been served upon the attorneys for the defendants.

As this appeal is being taken by direction of a Department of the Government of the United States, the plaintiff further prays that no bond be required of plaintiff to prosecute said appeal or answer in damages or costs, or otherwise, as a condition to the order allowing said appeal.

Dated the 23d day of April, 1936.

J. Turner Butler, Attorney for Plaintiff-Appellant.

Service of a copy of the foregoing notice is hereby admitted this 23d day of April, 1936.

Cary D. Landis, Attorney General of the State of Florida, as Attorney for certain of Defendants, by James B. Watson, Assistant Attorney General of the State of Florida.

Service of a copy of the foregoing notice is hereby admitted this 23d day of April, 1936.

T. J. Swanson, of Counsel for Taylor County, a Political Subdivision of the State of Florida, One of Defendants in Said Cause.

[fol. 53] EXHIBIT "A" TO PETITION FOR APPEAL

Treasury Department, Comptroller of the Currency, Washington

Address reply to "Comptroller of the Currency".

April 4, 1936.

Mr. Iron Ross, Receiver, The First National Bank of Perry, Florida.

Reply to CC-LD

DEAR SIR:

Reference is made to your letter of March 11, 1936 concerning the litigation in the United States District Court, Northern District of Florida, in the case of Iron Ross, Receiver of the First National Bank of Perry, Fla. v. W. V. Knott, as Treasurer of the State of Florida, et al. You have submitted a copy of the order entered by the Federal Court on February 29th dismissing the bill of complaint filed on your behalf. You have also submitted the opinion of the Court, as well as a copy of a letter received from your attorney recommending that an appeal be taken from the decision in question.

For the reasons stated by your attorney in his letter of March 3, 1936, we are of the opinion that the decision is erroneous. Accordingly, by direction of the Comptroller of

the Currency, you are instructed to perfect an appeal from the decision handed down by the United States District Court on February 29, 1936 to the United States Circuit Court of Appeals.

In view of this direction, no appeal bond need be filed by you under the provisions contained in the Judicial Code, Title 28 U. S. C. A. Section 870 and the decisions of the Fed-
{fol. 54} eral Courts in the cases of Pacific National Bank v. Mixter, 114 U. S. 463, 29 L. Ed. 221 and Robinson v. Southern National Bank, 94 Fed. 22.

Very truly yours, George P. Barse, General Counsel,
Comptroller of the Currency.

Approved: Gibbs Lyons, Deputy Comptroller.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL

The application of the Attorney for the Plaintiff for appeal, together with the Assignments of Error accompanying same having been presented to this Court, it is

Ordered, Adjudged and Decreed That an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the Final Decree filed and entered February 29, 1936, dismissing the Complainant's Bill of Complaint be and the same hereby is allowed.

It further appearing that said appeal is being taken by direction of a Department of the Government of the United States, it is

Ordered, Adjudged and Decreed That no appeal bond shall be required of the plaintiff.

Done and Ordered by me in my Chambers this 23d day of April, A. D. 1936.

A. V. Long, Judge.

Received Apr. 27, 1936.

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR RESTRAINING ORDER—Filed April 23, 1936

To the Honorable A. V. Long, Judge of said Court:

1. Your petitioner, plaintiff herein, respectfully represents that an application has been filed herein by the plaintiff for an order granting an appeal from the Order of this Court, under date of February 29, 1936, dismissing the Complainant's Bill of Complaint.

2. Your petitioner would further show that it is alleged in Paragraph 8 of said Bill of Complaint that W. V. Knott, as State Treasurer of the State of Florida, J. M. Lee, as State Comptroller of the State of Florida, and Dave Sholtz, as Governor of the State of Florida, are now threatening to proceed under the provisions of Chapter 14653, Laws of Florida, Acts of 1931, to sell the collateral now in the hands of W. V. Knott, as Ex-Officio County Treasurer of Taylor County, under said illegal pledges, and apply the proceeds in payment of the claim of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and if said officers are permitted to proceed with the sale and sell said securities, the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, will have obtained a further and additional illegal preference of the said Bank to the irreparable damage of the plaintiff and general creditors of the Bank.

3. Your petitioner would further show that it is alleged in Paragraph 11 of said Sworn Bill of Complaint that the plaintiff is entitled to an injunction jointly and severally to enjoin the said defendants, W. V. Knott, as Treasurer of the State of Florida, Dave Sholtz, as Governor of the State of Florida, and J. M. Lee, as Comptroller of the State of Florida, and/or as Members of the Board of Administration of the State of Florida, from selling said pledged securities [fol. 56] now in the possession of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and that plaintiff is likewise entitled to an injunction to enjoin and restrain W. V. Knott, State Treasurer, as Ex-Officio

County Treasurer, and/or the Board of Administration of the State of Florida from asserting any claim to the pledged collateral now in the possession of the plaintiff.

4. Your petitioner re-avers each and every of the allegations of said sworn Bill of Complaint which are incorporated herein by reference, and your petitioner further avers that it is the duty of this Court to maintain the present status quo and preserve the rights of the parties pending said appeal.

5. Wherefore, the premises above considered and for the purpose of preserving the present status pending the appeal, your petitioner prays that until said appeal has been decided and finally disposed of, that the defendants, W. V. Knott, as Treasurer of the State of Florida, Dave Sholtz, as Governor of the State of Florida, and J. M. Lee, as Comptroller of the State of Florida, and/or as Members of the Board of Administration of the State of Florida, are hereby enjoined from selling or disposing of said pledged securities described in the Bill of Complaint as now in the possession of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and that pending said appeal that W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, and the Board of Administration of the State of Florida be enjoined from asserting any right to the possession of the pledged collateral described in the Bill as now in the possession of plaintiff. And your petitioner will ever pray.

J. Turner Butler, Attorney for Petitioner, Plaintiff.

[fol. 57] Service of the foregoing Petition is hereby acknowl-dged this 23d day of April, 1936.

Cary D. Landis, Attorney General of the State of Florida, as Attorney for Certain of the Defendants, by James B. Watson, Assistant Attorney General of the State of Florida.

Service of the foregoing Petition is hereby acknowledged this 23rd day of April, 1936.

T. J. Swanson, Attorney for Taylor County, a Political Subdivision of the State of Florida, one of Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

RESTRAINING ORDER

This cause having come on to be heard upon application of the plaintiff herein for a restraining order, and it appearing that the plaintiff has filed his Bill of Complaint against the defendants to recover certain securities that are now held by the defendant, W. V. Knott, State Treasurer of the State of Florida, as Ex-Officio County Treasurer of Taylor County, under pledge for the purpose of securing funds heretofore deposited in the First National Bank of Perry, and that the plaintiff has sought in his said Bill of Complaint other relief, and it appearing that the said defendants filed motions to dismiss the Bill of Complaint and that said motions to dismiss said Bill of Complaint have been sus- [fol. 58] tained, and that an appeal is being taken by the plaintiff to the United States Circuit Court of Appeals in and for the Fifth Circuit from the Order and Decree of this Court dismissing said Bill of Complaint, and it further appearing that an application has been made to restrain certain of the defendants from selling the securities pending apeal in order that the present status may be preserved pending appeal;

It Is Therefore, Ordered, Adjudged and Decreed, That the defendants, W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, W. V. Knott, as Treasurer of the State of Florida, J. M. Lee, as Comptroller of the State of Florida, and Dave Sholtz, as Governor of Florida, and/or as Members of the Board of Administration of the State of Florida, be and they hereby are jointly and severally enjoined pending said appeal from selling all or any part of the securities now held by W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, for the purpose of securing pledges or attempted pledges made by the First National Bank of Perry, as described and set forth in the Bill of Complaint.

Done and Ordered, by me at my Chambers this 23 day of April, 1936.

A. V. Long, Judge.

Service of the foregoing Order is hereby acknowledged this — day of April, 1936.

——, Attorney General of the State of Florida, as Attorney for Defendants. —— ——, Attorney for Taylor County, a Political Subdivision of the State of Florida, one of Defendants.

Received Apr. 27, 1936.

[fol. 59] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed April 23, 1936

Comes now the plaintiff in the above entitled cause by his Attorney, J. Turner Butler, and assigns error upon the ruling and decision of the District Court of the United States for the Northern District of Florida in the above entitled cause, as follows:

(a) That the Court erred in finding the equities in said cause for defendants and against plaintiff.

(b) That the Court erred in its order under date of February 29, 1936, dismissing the Bill of Complaint because:

1. The Court in effect held that the Amendment to the National Bank Act that became operative June 25, 1930 validated pledges made prior to June 25, 1930 as to unpaid balances remaining on deposit after June 25, 1930.

2. That the Court held that the Bank "in order to retain the unpaid balances of the deposit made prior to the Amendment permitted its security to remain pledged to secure such balances due, at a time when the State laws required and the National Bank Act permitted such security to be given."

3. The Court in effect held that the pledge agreements could be given effect as to deposits made prior to June 25, 1930.

4. That the Court in effect held that the Bank had power to pledge assets prior to June 25, 1930.

[fol. 60] 5. That the Court in effect held legal pledges that were made prior to June 25, 1930.

6. That the Court in effect refused to hold that the failure of the State to withdraw the balance of deposits subsequent to June 25, 1930 constituted an election on the part of the State to treat the balance on deposit from and after June 25, 1930 as an unsecured balance.

7. The Court in effect refused to hold that the duty devolved upon the State Treasurer after the Amendment to the National Bank Act became operative on June 25, 1930 to secure a repledge of the pledged assets and that his failure to do so constituted an election on the part of the State Treasurer to treat the balance on deposit from and after June 25, 1930 as an unsecured deposit.

8. The Court in effect held that on June 25, 1930 and thereafter such security was held under the pledge agreement set up in the Bill.

9. That the Court in effect refused to hold that after the Amendment to the National Bank Act became operative on June 25, 1930 that the duty devolved upon the State to withdraw the balances of deposit that were deposited prior to June 25, 1930, unless it was the purpose of the State to treat the balances on deposit made prior to June 25, 1930 as unsecured.

10. The Court in effect refused to hold that if it was the purpose of the State Treasurer to contend that deposits made prior to June 25, 1930 were secured by the pledges, that the duty devolved upon the State Treasurer after the Amendment to the National Bank Act became operative on June 25, 1930 to secure a repledge of the pledged assets.

[fol. 61] 11. The Court in effect refused to hold that when the Amendment to the National Bank Act became operative on June 25, 1930 that the State Treasurer should either have withdrawn from the Bank the balances on deposit or should have secured a repledge of the pledged assets.

12. That the Court in effect refused to hold that it was the duty of the Receiver to set aside the transactions involved which illegally reduced the assets available for general creditors even if the Bank itself was not in a position to do so.

13. That the Court in effect held that the Statute of June 25, 1930 amending the National Bank Act should be con-

strued as relating to transactions that occurred prior to its adoption.

14. That the Court in effect gave the Amendment to the National Bank Act of June 25, 1930 a retroactive or retrospective operation by holding that the same validated pledges made prior to its enactment.

15. That the Court by its order in effect has prevented a ratable distribution of the assets of said Bank among the general creditors.

16. That the Court has held in effect by said order that the officers of said Bank were authorized to execute said pledge agreements.

17. That the Court has in effect held that the said agreements and pledges in pursuance thereof did not create an unlawful preference in favor of the defendant, W. V. Knott, State Treasurer of the State of Florida, as Ex-Officio County Treasurer of Taylor County, as against other general creditors of the said First National Bank.

[fol. 62] 18. That the Court has in effect held that the Act of Congress of the United States, approved June 25, 1930, and the Statutes of the State of Florida, operated to validate pledges which were unlawful at the time the pledges were made.

19. That the Court by its order has refused to hold that it was illegal and ultra vires for the First National Bank of Perry to guarantee deposits of a general creditor or a depositor of said Bank prior to June 25, 1930.

20. That the Court by its order has in effect refused to hold that when the funds were deposited in the First National Bank of Perry that said funds became intermingled with other funds of the said First National Bank of Perry and became the property of the said Bank and the depositor became a general creditor of the said Bank without security.

21. That the order of said Court, if sustained, will prevent a ratable distribution of the assets of said Bank.

22. That the order of said Court operates in effect to prefer one general creditor over other general creditors.

(c) That the effect of said Order dismissing the Bill is to refuse to hold that the action of the plaintiff in delivering to

W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, the pledged collateral; the action of the plaintiff in paying over to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, the sum of $20,759.37, being the proceeds derived by plaintiff from the collection of pledged collateral; the action of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, in collecting interest from the pledged collateral in [fol. 63] the sum of $2,025.00 and applying the same in part payment of his claim against said Bank; and the action of W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, or the action of W. V. Knott, State Treasurer, J. M. Lee, State Comptroller and Dave Sholtz, as Governor of the State of Florida, in selling one of the bonds held as collateral in the sum of $1,042.50 and applying the moneys so derived in part payment of the claim against the Bank, were all severally illegal, ultra vires and void for all or any of the following several reasons:

1. That the said actions operated to prefer the said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, a general creditor over other general creditors.

2. That said actions prevent a ratable distribution of assets among creditors as required by law.

3. That said action was based upon a misapprehension or mistake of the applicable law.

4. That said payments were preferential payments that were made under a mistake of the applicable law.

5. That said delivery of said securities by plaintiff to defendant, W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, resulted from a mistake by plaintiff, an officer of the United States, of the applicable law.

6. That the payment by plaintiff to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, of $20,759.31 derived from the collections from [fol. 64] pledged collateral resulted from a mistake by plaintiff, an officer of the United States, of the applicable law.

7. That the action of the plaintiff in paying to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of

Taylor County, the proceeds from pledged collateral and the delivery to him of pledged collateral was based upon a misapprehension or mistake of the plaintiff, an officer of the United States, as to the legality of the pledges described.

8. That all of said sums paid to W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, should have been distributed ratably among the general creditors.

9. That the securities delivered to said W. V. Knott, State Treasurer, as Ex-Officio County Treasurer of Taylor County, should have been sold and the proceeds distributed ratably among the creditors of said Bank.

10. That the said actions of the Receiver and said officials of the State of Florida and the County of Taylor sought to be set aside would, if sustained, have the force and effect of validating or ratifying illegal contracts made prior to the closing of the Bank.

11. That neither the Receiver nor the officials of the State of Florida, or the County of Taylor, have any power to bind stockholders and creditors by recognizing any illegal contract made prior to the closing of the Bank.

J. Turner Butler, Attorney for Plaintiff-Appellant.

[fol. 65] Received copy of the foregoing Assignment of Errors and service thereof accepted this 23d day of April, 1936.

Cary D. Landis, Attorney General of the State of Florida, as Attorney for Certain of the Defendants, by James B. Watson, Assistant Attorney General of the State of Florida. T. J. Swanson, of Counsel for the Defendant, Taylor County, a Political Subdivision of the State of Florida.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT

To the Clerk of the United States District Court for the Northern District of Florida:

You will please prepare a transcript of the record in the above entitled cause for the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in said cause, and include in said transcript the following pleadings, instruments and proceedings, to-wit:

1. Copy the Bill of Complaint filed herein on the 11th day of December, 1935.
2. Copy the Motion to Dismiss the Bill of Complaint filed by the defendant, Taylor County, a political subdivision of [fol. 66] the State of Florida, on January 30, 1936.
3. Copy the Joint and Several Motion to Dismiss the Bill of Complaint of W. V. Knott, as Treasurer of the State of Florida, et al., filed January 3, 1936.
4. Copy additional grounds of Motion to Dismiss and Supplemental Motions to Dismiss parts of Bill of Complaint, filed February 20, 1936.
5. Copy Opinion of the Court dated February 29, 1936 and filed March 1, 1936.
6. Copy Order dated February 29, 1936 and filed March 2, 1936, dismissing the Bill of Complaint.
7. Copy Petition for Appeal and Order allowing same.
8. Copy Petition for restraining order pending appeal and order thereon.
9. Copy Assignment of Errors.
10. Copy this Præcipe.
11. Copy Citation and service thereof.
12. Omit all other papers and proceedings.

J. Turner Butler, Attorney for Plaintiff, Appellant.

[fol. 67] Received a copy of the foregoing Præcipe and service thereof accepted this 23d day of April, 1936.

Cary D. Landis, Attorney General of the State of Florida, as Attorney for Certain of the Defendants, by James B. Watson, Assistant Attorney General of the State of Florida.

Received a copy of the foregoing Præcipe and service thereof accepted this 23d day of April, 1936.

T. J. Swanson, Attorney for Taylor County, a Political Subdivision of the State of Florida, One of the Defendants.

It Is Stipulated And Agreed by and between the parties hereto by their undersigned attorneys and solicitors that the Transcript on the appeal entered in the above entitled cause shall be made up of the foregoing papers.

J. Turner Butler, Attorney for Plaintiff. Cary D. Landis, Attorney General, as Attorney for Certain of the Defendants. T. J. Swanson, Attorney for Taylor County, a Political Subdivision of the State of Florida, One of Defendants.

Received Apr. 27, 1936.

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

RECITAL AS TO CITATION

Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * * *

[fol. 69] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 4th, 1937

No. 8112

IRON ROSS, as Receiver of the First National Bank of Perry, a Corporation under the National Banking Laws,

versus

W. V. KNOTT, as Treasurer of the State of Florida, and as Ex-Officio County Treasurer of Taylor County, Florida, et al., and as Members of and Constituting the Board of Administration of the State of Florida

On this day this cause was called, and, after argument by J. Turner Butler, Esq., for appellant, and James B. Watson, Esq., and T. J. Swanson, Esq., for appellees, was submitted to the Court.

[fol. 70] OPINION OF THE COURT—Filed January 22, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8112

IRON ROSS, as Receiver of the First National Bank of Perry, a Corporation under the National Banking Laws, Appellant,

versus

W. V. KNOTT, as Treasurer of the State of Florida, and as Ex-Officio County Treasurer of Taylor County, Florida, et al., and as members of and Constituting the Board of Administration of the State of Florida, Appellees

Appeal from the District Court of the United States for the Northern District of Florida

(January 22, 1937)

Before Foster, Sibley and Hutcheson, Circuit Judges

HUTCHESON, Circuit Judge:

The suit, by the receiver of a failed national bank, was to cancel a contract it had made pledging securities for public

deposits, to-wit, bond funds of Taylor County, Florida, to recover the pledged securities, and to get back moneys paid [fol. 71] the depositor in the course of liquidation as proceeds from some of the securities. The petition alleged that the agreement for the pledge was made and the securities were pledged before the passage of the Enabling Act of June 25, 1930,[1] Section 90, Title 12, U. S. C. A. and that the deposits had remained in the bank without change in either the agreement, the securities, or the deposits after its passage until in October, when the bank failed, and the receiver was appointed. It was alleged too that under a misconception as to the law the pledge agreement had been treated by the receiver as valid and collections from the pledged securities had been paid over to the county until the bringing of this suit. It was not alleged that the bank was insolvent or in a failing condition on June 25th, or, indeed, until some time in October, when it failed.

The District Judge thought the Enabling Act effective to validate the arrangement from and after its passage. He thought the matter stood in law just as it would have stood if there had been a new agreement, or new deposits had been made after the passage of the act. He did not think it material that no change was made in the agreement, the securities, or the deposits. He decided the case against the receiver on the demurrer. This appeal followed. Those on the county's side contended below, they contend here, as a minor argument, that the acts of the receiver in accepting the pledge agreement as valid, and in proceeding on that assumption for several years, gave the agreement a new strength and validity, if it had none before. Their real contention, however, is that the District Judge was right in giving validating effect to the act as to the continuance of the deposits after its passage, and on this they take firm [fol. 72] stand. We think the position well taken, and that the judgment should be affirmed on that ground. Counsel for appellant and appellees extensively present and discuss

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[1] "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

the many decisions on the power of national banks to give pledges in security for deposits. Each insists that their effect is to support the view he advances. We do not think it necessary to enter into any extended discussion or analysis of these cases, for none of them is exactly in point, and only one, Lewis v. Fidelity and Deposit Co., 292 U. S. 559, is at all controlling. As to this case, each finds in it something of comfort to himself. Appellant insists that its affirmance of the judgment, upholding the security, was made to turn on the fact that, though the agreement for security antedated the June, 1930, act, all of the deposits then existing were afterwards drawn down and new deposits made. Appellees insist that, while these facts were commented upon in the opinion, it was only because they were the facts of that case, that the court expressly reserved opinion upon the validating effect of the act under other circumstances. They insist that continuing deposits as the deposits in this case were, by being allowed to remain in the bank after June 25th, are to be considered as made after that date just as much as if they had been drawn down and redeposited. They insist, in short, that the decision in the Lewis case, that an agreement for security was valid as to deposits made after, on an agreement for security made before, June 25th, is authority for the position they take here, that deposits secured by pledge agreement made before that date, are, if allowed to remain in the bank after it, validly secured by the agreement, the condition of their being placed there and the continuing condition of their being allowed to remain. In Florida it has long been the law that state banks may give security for public deposits. First American Bank and Trust Co. v. Town of Palm Beach, 96 Fla. 247. For years before the 1930 Enabling Amendment was passed it had been the practice of national banks in Florida in competition with state banks to give security [fol. 73] for public deposits. When the contract for security was made in this case it was made, in good faith, and without time limit, as a continuing contract, both parties to it believing that it was a reasonable one and that the bank was within its corporate powers in making it. If the contract had not been made, the county would not have deposited its funds in the bank. If it had not been understood to be a continuing contract, the funds on deposit would not have been allowed to remain there. Invalid then though the

security was in law for want of granted power before the passage of the Enabling Act, it became, we think, valid in law, after it was passed, as to all deposits covered by it without distinction between deposits newly made and those remaining there from an earlier depositing. The statute certainly does not in terms, we think it does not in effect, distinguish between agreements or deposits made before and those made after its enactment. The statute is an act of enablement. Settling a troublesome question about and curing a former deficiency in power, it enabled national banks to compete with state banks for the deposit of public moneys by authorizing them to secure such deposits where, by state law, state banks could secure them.

When the purpose of the statute is considered in the light of the long-continued practice of national banks, known to and recognized by the Comptroller, of giving security for public deposits, and the desire of Congress to authorize [fol. 74] this practice,[2] it would, we think, be an unreasonable construction of the act to hold that Congress intended by it to provide that, in order to be valid, all existing arrangements for security must be cancelled out and new ones entered upon. We think the contrary intent manifest. We know from the history of the act that its purpose, we think its effect, was to fully enable national banks to compete with state banks. We think that from and after its passage, as

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[2] The proceedings in Senate and House when the act was passed show this clearly.

"In Senate Report No. 67, 71st Cong. 2nd Sess., the committee based its favorable report upon a letter from the Attorney General of Minnesota, reading in part as follows: 'The United States district court for this district has held that it may not thus pledge its assets to secure private deposits and the trend of authority generally seems to be to the effect that a bank may not in any case pledge its assets to secure a deposit unless authorized by law so to do.

The National banks of this State have pledged with the State and the various sub-divisions thereof millions of dollars in Government and other bonds as security for public deposits. They are anxious to be permitted to do so, and we are willing that they should. Under the law as it now stands we may be taking a chance in accepting such pledges from the national banks, and we should like to have the chance

to all public funds on deposit in national banks in states where state banks could give security, whether deposited before or after the passage of the act, arrangements made before its passage for their security, equally with those made afterward, are valid.

Judgment affirmed.

[fol. 75] JUDGMENT

Extract from the Minutes of January 22, 1937

No. 8112

IRON ROSS, as Receiver of the First National Bank of Perry, a Corporation under the National Banking Laws,

versus

W. V. KNOTT, as Treasurer of the State of Florida, and as Ex-Officio County Treasurer of Taylor County, Florida, et al., and as Members of and Constituting the Board of Administration of the State of Florida

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Florida, and was argued by counsel;

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removed by legislation in Congress which will specifically authorize such pledges by national banks' ".

* * * * * * *

"From House Report No. 1657, 71st Cong. 2nd Sess., it appears that the committee reported favorably upon the bill (S. 486) because of a request from the acting Secretary of the Treasury reading in part as follows: 'While the office of the Comptroller of the currency has consistently taken the position that national banks have the right to give security for the safekeeping and prompt payment of public moneys of the State or political subdivision thereof deposited with such national banking associations, several recent decisions have thrown some doubt on this question with the result that in some States the State banks may secure the public deposits but the officers of the State are in doubt about depositing with the national banks in the absence of any specific law by Congress on the subject. It would be extremely helpful, therefore, if it is possible for your committee to report out, and the House pass, S. 486'."

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Iron Ross, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws, be condemned to pay the costs of this cause in this Court.

[fol. 80] ORDER DENYING REHEARING

Extract from the Minutes of February 5th, 1937

No. 8112

IRON ROSS, as Receiver of the First National Bank of Perry, a Corporation under the National Banking Laws,

versus

W. V. KNOTT, as Treasurer of the State of Florida, and as Ex-Officio County Treasurer of Taylor County, Florida, et al., and as Members of and Constituting the Board of Administration of the State of Florida

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 81] MOTION AND ORDER STAYING MANDATE — Filed February 24, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 8112

IRON ROSS, as Receiver of the First National Bank of Perry, a Corporation under the National Banking Laws, Appellant,

vs.

W. V. KNOTT, as Treasurer of the State of Florida, and as Ex-Officio County Treasurer of Taylor County, Florida, et al., and as Members of and Constituting the Board of Administration of the State of Florida, Appellees

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Your petitioner, Iron Ross, Appellant in the above entitled cause, by his Attorney, J. Turner Butler, brings this his petition and respectfully represents unto your Honor:

1. That on the 23d day of April, 1936 your petitioner did enter in the District Court of the United States, in and for

the Northern District of Florida, his appeal to the United States Circuit Court of Appeals, in and for the Fifth Circuit, from the Order and Decree of the United States District Court, in and for the Northern District of Florida, dismissing the Bill of Complaint filed in the United States District Court, in and for the Northern District of Florida, by your petitioner, Iron Ross, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws, against W. V. Knott, as Treasurer of Florida, W. V. Knott, Treasurer of the State of Florida, as [fol. 82] Ex-Officio Treasurer of Taylor County, Dave Sholtz, Governor of the State of Florida, J. M. Lee, as Comptroller of the State of Florida, Taylor County, a political subdivision of the State of Florida, and W. V. Knott, Treasurer of Florida, Dave Sholtz, Governor of Florida, and J. M. Lee, Comptroller of Florida, as members of and constituting the Board of Administration of the State of Florida, the said appeal having been made returnable to this Court on the 21st day of May, 1936, as will appear from the record in said cause filed in this Court on May 12, 1936, reference thereto being herein and hereby prayed.

2. Your petitioner would further show that the Lower Court issued a Restraining Order enjoining the sale of the securities involved in said litigation pending said appeal, as will appear from page 57 of the record, reference thereto being herein and hereby prayed.

3. Your petitioner would further show that by Opinion dated the 22nd day of January, 1937, this Court did affirm the decision of the Lower Court, as will appear from the records of this Court, reference thereto being herein and hereby prayed.

4. Your petitioner would further show that your petitioner filed in this Court its petition for rehearing and that said petition for rehearing was overruled on the 5th day of February, 1937, as will appear from the records of this Court.

5. Your petitioner would further show that your petitioner is now preparing a petition to be filed in the Supreme Court of the United States for review on certiorari of the said judgment rendered herein by this Court.

[fol. 83] Wherefore, the premises above considered, your petitioner prays that the mandate of this Court in said

cause be stayed or withheld until the petition now in process of preparation by petitioner for certiorari be disposed of by the United States Supreme Court, upon the condition, however, that the appellant's petitioner's petition for writ of certiorari shall be docketed in the office of the Clerk of the United States Supreme Court within three months from the date of the Order of this Court sustaining the Order of the United States District Court, in and for the Northern Ditsrict of Florida, in said cause and that or if your petitioner has prayed for improper relief, that this Court will make such Order as will preserve the existing status until such time as will give petitioner reasonable opportunity to present his case to the Supreme Court of the United States and secure a determination thereof by said Supreme Court of the United States.

J. Turner Butler, Attorney for Petitioner-Appellant Herein.

[fol. 84] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 8112

IRON ROSS, as Receiver of the First National Bank of Perry, a Corporation under the National Banking Laws, Appellant,

versus

W. V. KNOTT, as Treasurer of the State of Florida, and as Ex-Officio County Treasurer of Taylor County, Florida, et al., and as Members of and Constituting the Board of Administration of the State of Florida, Appellees.

On Consideration of the Application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court

the certificate of the clerk of the Supreme Court that the certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 24th day of February, 1937.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 85] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered form 69 to 84 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8112, wherein Iron Ross, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws is appellant, and W. V. Knott, as Treasurer of the State of Florida, and as Ex-Officio County Treasurer of Taylor County, Florida, et al., and as Members of and Constituting the Board of Administration of the State of Florida, are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 68 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louis-

iana, in the Fifth Circuit, this 24th day of February, A. D. 1937.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 86] MOTION AND ORDER STAYING MANDATE THIRTY DAYS FROM MARCH 24th, 1937—Filed March 22, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

Case No. 8112

IRON ROSS, as Receiver of the First National Bank of Perry, a Corporation under the National Banking Laws, Appellant,

versus

W. V. KNOTT, as Treasurer of the State of Florida, W. V. Knott, Treasurer of the State of Florida, as Ex-Officio Treasurer of Taylor County, Florida, et al., Appellees

To the Judges of the Circuit Court of Appeals of the United States in and for the Fifth Circuit:

Your petitioner, Iron Ross, Appellant herein, brings this his petition and respectfully represents unto your Honor as follows:

1. Your petitioner would show that on the 24th day of February, 1937, this Court made an Order providing for a Stay of Mandate herein, provided that within thirty days from the date of the Order there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court of the United States that a petition for certiorari and record has been filed in that Court and that due proof of service of notice thereof, under Paragraph 3 of Rule 38 of the Supreme Court of the United States has been given.

[fol. 87] 2. Your petitioner would further show that immediately after your petitioner's petition for rehearing herein filed was denied by this Court that your petitioner did apply to the Comptroller of the Currency of the United States for

authority to petition the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court in this cause; that upon receipt of your petitioner's application to be permitted to apply for a writ of certiorari herein by the Comptroller of the Currency, the matter was referred to the General Counsel of the Comptroller of the Currency and that upon advice of the General Counsel of the Comptroller of the Currency your petitioner was empowered by the Comptroller of the Currency to petition for the writ of certiorari to review the judgment of this Court.

3. Your petitioner would further show that immediately upon receipt of the authority to take the appeal that your petitioner instructed his attorney to begin the preparation of the petition for certiorari and the supporting brief and that the said petition and supporting brief have been prepared by your petitioner's attorney and the same have been transmitted to the Comptroller of the Currency in Washington, D. C. for approval by the Counsel of the Comptroller; that when the said petition and supporting brief have been approved the same are to be returned to your petitioner to be printed and filed in the Supreme Court of the United States in accordance with the Rules of the Supreme Court.

4. Your petitioner would further show that so much time has been consumed in the transmission of the request to the Comptroller of the Currency at Washington for authority to petition for the writ of certiorari and so much time has been consumed in the return of said authority, and so much time has been consumed by the Department in [fol. 88] investigating the questions involved that it has been impossible for your petitioner to get on file in the Supreme Court of the United States the petition for writ of certiorari and supporting brief and to have the same served as required by the previous Order of this Court.

5. Your petitioner would further show that this application is not made for delay but your petitioner is advised by his counsel and your petitioner believes that your petitioner has meritorious reasons to believe he has the right to apply for writ of certiorari to be issued in said cause and that your petitioner has been proceeding as expeditiously as it has been possible for your petitioner so to do; that the

delay to which your petitioner has been subjected has been unavoidable, due to the necessity for reference of the matter to departmental heads for authority to take an appeal, due to the time required by the agents of the Treasury Department to investigate the matter and due to loss of time necessarily involved in the transmission of the request and Orders thereon through the mails.

Wherefore, your petitioner prays that the Order heretofore granted by this Court for a Stay of Mandate be extended for thirty days from and after March 24, 1937, provided that within said thirty days from the date of March 24, 1937, there shall be filed with the Clerk of this Court the certificate of the Supreme Court of the United States that the certiorari petition and record have been filed in the Supreme Court of the United States and that due proof of service of the notice thereof, under Paragraph 3 of Rule 38 of the Supreme Court has been given. And your petitioner will ever pray.

J. Turner Butler, Attorney for Petitioner. Iron Ross, Petitioner.

[fol. 89] STATE OF FLORIDA,
County of Duval:

Personally appeared before me, a Notary in and for the State of Florida at large, one Iron Ross who being by me first duly sworn, deposes and says that the foregoing petition subscribed by him is true.

Iron Ross.

Sworn to and Subscribed before me this 18th day of March, 1937. Agnes Zetrouer, Notary Public, State of Florida at Large. My Commission expires: February 19, 1941. (Seal.)

[fol. 90] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 8112

IRON ROSS, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws, Appellant,

versus

W. V. KNOTT, as Treasurer of the State of Florida, and as Ex-Officio County Treasurer of Taylor County, Florida, et al., and as members of and constituting the Board of Administration of the State of Florida, Appellee

On Consideration of the Application of the Appellant in the above numbered and entitled cause for a further stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is Ordered that the issue of the mandate of this court in said cause be and the same is further stayed for a period of thirty days; from March 24th, 1937; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from March 24th, 1937, there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from March 24th, 1937, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 22nd day of March, 1937.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 91] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 24, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,451. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 32. Iron Ross, as Receiver of the First National Bank of Perry, etc., petitioner, vs. W. V. Knott, as Treasurer of the State of Florida, W. V. Knott, Treasurer of the State of Florida, as Ex-Officio County Treasurer of Taylor County, Florida, et al. Petition for a writ of certiorari and exhibit thereto. Filed April 21, 1937. Term No. 32, O. T., 1937.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 21 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936.

No. [redacted] 32

IRON ROSS, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws,
Petitioner,

vs.

W. V. KNOTT, as Treasurer of the State of Florida; W. V. KNOTT, Treasurer of the State of Florida, as Ex Officio County Treasurer of Taylor County, Florida; DAVE SHOLTZ, as Governor of the State of Florida; J. M. LEE, as Comptroller of the State of Florida; TAYLOR COUNTY, a Political Subdivision of the State of Florida; and W. V. KNOTT, Treasurer of Florida, DAVE SHOLTZ, Governor of Florida and J. M. LEE, Comptroller of the State of Florida, as Members of and constituting the Board of Administration of the State of Florida,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

J. TURNER BUTLER,
Attorney for Petitioner.

GEORGE P. BARSE,
Attorney for the Comptroller of the Currency, of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No.

IRON ROSS, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws,
Petitioner,

vs.

W. V. KNOTT, as Treasurer of the State of Florida; W. V. KNOTT, Treasurer of the State of Florida, as Ex Officio County Treasurer of Taylor County, Florida; DAVE SHOLTZ, as Governor of the State of Florida; J. M. LEE, as Comptroller of the State of Florida; TAYLOR COUNTY, a Political Subdivision of the State of Florida; and W. V. KNOTT, Treasurer of Florida, DAVE SHOLTZ, Governor of Florida and J. M. LEE, Comptroller of the State of Florida, as Members of and constituting the *Board of Administration of the State of Florida,*
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Iron Ross, as Receiver of the First National Bank of Perry, Florida, by direction of the Comptroller of the Currency, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit in the above

captioned cause (R. ~~70~~ 73) entered on January 22, 1937, reported in 87 F. (2) 817.

I.

OPINIONS OF COURTS BELOW.

The opinion and order of the District Court are set out in the Record at pages 44 and 50 and are reported in 13 Fed. Supp. 963. The opinion of the Circuit Court of Appeals for the Fifth Circuit is found in the Record at page ~~70~~ 69 and is reported in 87 Fed. (2) 817.

II.

JURISDICTION.

The decree of the Circuit Court of Appeals to be reviewed was entered January 22, 1937 (R. [redacted] 73). Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Section 347).

III.

SUMMARY STATEMENT.

The facts are not in controversy. The Receiver filed suit to set aside and have declared null and void certain pledges of assets made by the First National Bank of Perry, while a going concern, to secure various deposits of public money belonging to Taylor County, Florida, on the ground that said pledges of assets were made prior to the Enabling Act of June 25, 1930, c. 604, 46 Stat. 809; 12 U. S. C. 90, which act for the first time authorized national banks to give security for public deposits of a state or political subdivision. Said statute provides:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt pay-

ment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The First National Bank of Perry, Florida, was closed by the Board of Directors on October 18, 1930 (R. 6) and a Receiver was appointed by the Comptroller of the Currency on October 25, 1930 (R. 11). On March 12, 1930 the bank pledged with and delivered to W. V. Knott, Treasurer of the State of Florida, as County Treasurer Ex Officio of Taylor County, Florida, $10,000.00 par value County of Sarasota 5½% Highway Bonds as security for funds deposited (R. 7). On March 15, 1930, the bank also pledged with and delivered to said State Treasurer for a similar purpose $10,000.00 par value Town of Perry Bonds (R. 7). In 1929 and early in 1930 but not after May 2, 1930 the bank pledged with the Bond Trustees of Taylor County (the designation under which the account was carried prior to being taken over by the State Treasurer as County Treasurer Ex Officio of Taylor County), securities consisting of mortgages, notes and bonds having a face value of $69,549.76 for the purpose of securing deposits of the Bond Trustees of Taylor County, which were assigned to W. V. Knott, State Treasurer, as Ex Officio County Treasurer of Taylor County on May 2, 1930 (R. 8-25, 26). All of this last group of securities remained in the physical possession of the bank until after closing (R. 8) when the Receiver delivered to Knott a portion of said collateral consisting of the bonds covered by the assignment of May 2, 1930, having a face value of $20,250.00 (R. 9).

No new deposits of Taylor County funds and no additional pledges of assets to secure said deposits, were made after June 25, 1930.

Dividends in the sum of $13,318.03 representing dividends of 19 per cent on the deposits have been paid Knott as Ex Officio County Treasurer (R. 9-10). From collections made on the pledged collateral remaining in his hands, the Re-

ceiver paid Knott as Ex Officio County Treasurer of Taylor County $20,759.31 (R. 10). Knott has collected $2,025.00 in interest and $1,042.50 from the sale of a portion of the collateral in his hands (R. 10). Knott is still holding pledged assets having a face value of $39,250.00 (R. 11, 27, 28).

To prevent the threatened sale of the remaining pledged assets and the application of the proceeds toward payment of the claim and to recover the pledged assets or their proceeds, the Receiver filed suit in the District Court on December 9, 1935. Defendants filed motions to dismiss the bill of complaint (R. 30, 32, 35) which were granted by the District Court (R. 44-50). 13 F. Supp. 963. The District Court's order was affirmed by the Circuit Court of Appeals. 87 F. (2) 817 (R. [redacted] 73).

IV.

THE QUESTION PRESENTED.

Was the Act of June 25, 1930 retroactive in effect so as to render valid pledges of assets made prior to that date to secure public money deposits of Taylor County, it appearing that no new funds were deposited and no new pledges were made subsequent to the passage of said act?

V.

SPECIFICATION OF ERRORS.

The Appellate Court erred in holding that the passage of the amendment to Section 45 of the National Bank Act on June 25, 1930, validated pledges by national banks made before that date as security for deposits of public money of a state or political subdivision made prior to June 25, 1930.

The Appellate Court erred in not holding that the Act of June 25, 1930 could not be given a retroactive or retrospective operation in the absence of such an intention by the Legislature plainly expressed in the law.

The Appellate Court erred in not holding that a contract beyond the power of a corporation to make cannot be made valid by a change in law not in force when the transaction was consummated.

The Appellate Court erred in not holding that the law in force at the time a transaction is consummated determines its validity.

The Appellate Court erred in not requiring the respondents to participate in the pro rata distribution provided by the National Bank Act.

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner believes that the writ of certiorari should be granted because:

(a) The decision of the Circuit Court of Appeals sustaining the validity of a pledge of assets made by a national bank before June 25, 1930, at a time when such banks could not legally pledge assets as security for public money deposits of a state or its political subdivisions, is in conflict with the principles applied by this Honorable Court in *Marion* v. *Sneeden,* 291 U. S. 262, 268, 269; *Texas & Pacific Railway Co.* v. *Pottorff,* 291 U. S. 245, 258, 259; *Lewis* v. *Fidelity & Deposit Company of Maryland,* 292 U. S. 559, 564, 570, 571. In the three decisions above mentioned, this Court held that a national bank prior to the amendment to Section 5153 of the Revised Statutes by said Act of June 25, 1930, could not legally pledge its assets as security for deposits of public money belonging to a state or its subdivisions.

(b) The court below has decided an important question of Federal law which has not been, but should be, settled by this Court.

In *Lewis* v. *Fidelity & Deposit Company of Maryland*, 292 U. S. 559, it appeared that although deposits had been made prior to the passage of the Act of June 25, 1930, nevertheless, at the time the bank closed, the balance then on hand consisted entirely of new deposits made subsequent to said Act of June 25, 1930, and under the circumstances the lien of the State, attaching under the Georgia statutes, as security for deposits, was held to be effective.

However, this Court explicitly refrained from passing upon the status of deposits, and the security for deposits, made prior to the passage of the act and in that connection said:

> "We have no occasion to consider whether the Act of June 25, 1930, would have validated the lien also in respect to deposits made before that date." (p. 571)

It is submitted that the foregoing question is now, in substance, presented to this court for decision for the first time.

There are now pending before the lower Federal Courts a number of suits involving secured deposits with insolvent national banks in which the question involved is the identical question raised in the instant suit. A determination of the validity of pledges made before the date of the Enabling Act of June 25, 1930 to secure deposits made before that date in cases where banks failed after the Act went into effect would be of great assistance to the Federal Courts in determining the pending suits now before them and would assist the Comptroller of the Currency from an administrative standpoint in determining the rights of secured creditors where assets were pledged by a national bank before June 25, 1930.

We submit that the correct doctrine is stated in the decision of the District Court of the United States,

District of Idaho, in the case of *Thompson* v. *Twin Falls Highway District,* 17 Fed. Supp. 705, 706, where it was held:

> "It is obvious that the deposits made prior to June 25, 1930, are the only ones concerned here, and as the bank could not then pledge its assets to secure them, the moneys when then deposited became a part of the common fund of the Commercial Department of the bank and were subject to the same risks as moneys of all other persons who made deposits in the bank and no act of the parties thereafter could have been done which would have retroactively converted the common character of the deposits into preferred or secured deposits when the claimed security was prohibited by law, and therefore they are incapable of being ratified."

In *Wood* v. *Imperial Irrigation District,* 17 Pac. (2) 128, 132, there was involved an analogous situation concerning the construction of a state statute which went into effect a few months before the state bank closed but after irrigation district funds had been deposited and secured by a pledge of assets. The new act in effect after the pledge and deposits were made and before closing of the bank, permitted the securing of such irrigation district funds and the question before the court was whether the original pledge contract was validated by the amendment to the depositary statute. The Supreme Court of California held that the original pledge was illegal, that the contract was not validated by the amendment to the depositary act, and a contract void because it stipulates for doing what the law prohibits, is incapable of being ratified. *The court further stated that the recognition of the contract for a long period after the act becomes legal does not constitute a ratification of the contract.* The pertinent portions of the opinion at page 132 thereof follow:

"We are of the view that the contract or agreement to pledge the bank's assets as security for the deposit made June 19, 1925, was illegal as an original transaction, being in contravention of section 21 of the Bank Act (as amended by St. 1913, p. 147) which declares that 'the capital and assets of any such bank are a security to depositors and stockholders, depositors having the priority of security over stockholders.' See, also, section 27 of the Bank Act (as amended by St. 1913, p. 151). The only manner in which the priority of one depositor may be secondary to the right of another depositor is by statutory enactment, which does not exist in favor of appellant under the law as it existed when it made its said deposits. The contract was not validated by the adoption of the act of July 29, 1927. At the time said moneys were deposited with the bank they became a part of the common fund of the commercial department of said bank, subject to the same risks as the moneys of all other persons who made deposits in said commercial department. The relationship of debtor and creditor was created. Prior to the security transaction herein appellant had actually made deposits with said bank for which no security was taken. No attempt was made to reaffirm, ratify, or bring the transaction within the purview of the act which became a law some two months and twelve days before the bank was taken over by the superintendent of banks, and no act could have been done by the parties to the transaction which would have retroactively converted the common character of said deposits into secured or preferred deposits. The funds had long since been disbursed through the commercial department as other depositors' funds had been disbursed. They were not then in the bank. *No deposits were made within the time in which the irrigation district was entitled to receive security for deposits, and only those bodies which made deposits and took security therefor under the express sanction of existing law were entitled to enjoy the extraordinary privilege provided by statute. A contract void because it stipulates for doing what the law prohibits is incapable of being ratified. The recognition*

of the contract for a long period after the act becomes legal does not constitute a ratification of the contract." (Italics inserted)

A contract of a corporation which is ultra vires and beyond the powers conferred upon it by the law-making body is not voidable but wholly void. The contract cannot be ratified by either party. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. It is incapable of ratification by estoppel or otherwise. *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 260; *California Bank* v. *Kennedy*, 167 U. S. 362, 371; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 553; *Central Transportation Co.* v. *Pullman*, 139 U. S. 24, 59; *Granzow* v. *Village of Lyons* (C. C. A. 7th) decided March 23, 1937. Appendix page 14.

The law in force at the time a transaction is consummated determines its validity. A contract invalid when made is not rendered valid by a law in force thereafter. *Memphis Railroad* v. *Commissioners*, 112 U. S. 609, 623; *International Products Co.* v. *Vails Estate*, 123 Atl. 194, 197; *People* v. *Nixon*, 128 N. E. 245, 246 (New York).

In the case of *Harvey* v. *Tyler*, 69 U. S. 328, 347, the court holds:

> "And it is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

In the *U. S. Fidelity & Guaranty Co.* v. *United States*, 209 U. S. 306, 314, it is held:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to

receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

Where the pledge was ultra vires and void, the Receiver of a national bank may recover the pledged assets or their proceeds. *Marion v. Sneeden,* 291 U. S. 262, 272; *Texas & Pacific Railway Co.* v. *Pottorff,* 291 U. S. 245, 261; *O'Connor* v. *Rhodes,* 79 F. (2) 146, 152; *Webb* v. *American Surety Company* (C. C. A. 5th) 88 F. (2) 171, 174; *Granzow* v. *Village of Lyons* (C. C. A. 7th) decided March 23, 1937, Appendix pg. 14; *Ross* v. *Lee,* 15 F. Supp. 972, 974; *Mays* v. *Wilkinson,* 12 F. Supp. 350, 355.

Furthermore, if the pledges were invalid for want of power on the part of the bank to make, the delivery by the Receiver after closing of a portion of the pledged assets and the payment to the State Treasurer of proceeds derived from the collections made on the pledged assets after suspension of the bank by the Receiver, constituted a transfer of assets after the commission of an act of insolvency, in violation of the provisions contained in Section 5242 of the Revised Statutes (Appendix pg. 13) and such preferential transfers of assets may be recovered by the Receiver of the insolvent national bank. *Mechanics Universal Joint Co.* v. *Culhane,* 299 U. S. 51, 58.

The State Treasurer as Ex Officio County Treasurer of Taylor County was a common or general creditor of the bank, entitled only to dividends on his claim the same as any other creditor of the insolvent bank. *Texas & Pacific Railway Co.* v. *Pottorff,* 291 U. S. 245, 262; *Cook County National Bank* v. *United States,* 107 U. S. 445, 448, 449.

To sustain the pledges would be inconsistent with the provisions of the National Bank Act which are designed to insure in case of disaster uniformity in the treatment of depositors and a ratable distribution of assets. *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 287; *Cook County National Bank* v. *United States,* 107 U. S. 445, 448, 449.

VII.

CONCLUSION.

It is believed that the foregoing discussion and citation of authorities show that the decisions of the courts below were erroneous. In the interest of uniformity of decisions applicable to the administration of all insolvent national banks, and in order that the present doubt as to the correct rule of law to follow may be settled, it is urged that this Honorable Court entertain a review of this case on writ of certiorari.

Respectfully submitted,

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APPENDIX.

Title 12 U. S. C. A., Sec. 194. (R. S. Sec. 5236)

DIVIDENDS ON ADJUSTED CLAIMS; DISTRIBUTION OF ASSETS. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

Title 12 U. S. C. A., Sec. 90. (R. S. Sec. 5153)

DEPOSITARIES OF PUBLIC MONEYS AND FINANCIAL AGENTS OF GOVERNMENT. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: Provided, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: Provided, That the Secretary of the Treasury shall distribute

the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. (Act of Mar. 3, 1901, c. 871, 31 Stat. 1448; Mar. 4, 1907, c. 2913, Sec. 3, 34 Stat. 1290; Dec. 23, 1913, c. 6, Sec. 27, 38 Stat. 274; Aug. 4, 1914, c. 225, 38 Stat. 682; June 25, 1930, c. 604, 46 Stat. 809).

Title 12 U. S. C. A., Sec. 91. (R. S. Sec. 5242)

TRANSFERS BY BANK AND OTHER ACTS IN CONTEMPLATION OF INSOLVENCY. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6027. October Term, 1936, January Session, 1937.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

CARL L. GRANZOW, Receiver of the First National Bank of Riverside, Illinois, *Appellant*,

vs.

THE VILLAGE OF LYONS, ILLINOIS, *Appellee*.

March 23, 1937.

Before Sparks, *Circuit Judge*, and Lindley and Baltzell, *District Judges*.

Lindley, *District Judge*. Appellant, receiver of a national bank, sued to recover from appellee, an Illinois municipal corporation, $17,000, representing the difference between the proceeds realized by appellee from a sale it made of certain assets of the bank which had been pledged to it to secure a deposit of municipal funds and the dividend to which appellee would have been entitled on its claim for such deposit as a general creditor. The court allowed appellee's motion to dismiss the suit, and this appeal followed.

The Bank, prior to 1932, received a deposit of municipal funds, pledging with appellee, at the latter's insistance, certain assets to secure the deposit. The bank became insol-

vent and suspended payment June 27, 1932. Appellant was thereupon appointed receiver. The deposit of appellee was then $39,323.

In due course of administration, both the receiver and the municipality, under a misapprehension of the law, agreed that the municipality might sell the collateral and apply the proceeds of the sale upon the debt. The comptroller of the currency approved this agreement subject to approval by the District Court. Appellant thereupon filed his petition and secured an order authorizing sale of said assets as agreed. The sale was had and application of the proceeds made on the debt.

Sometime thereafter the parties awoke to the fact that these transactions had taken place under a mutually mistaken view of the law. This court in *Sneeden* v. *City of Marion,* 64 F. (2d) 721, held that in Illinois a national bank does not have the power to pledge its assets to secure a deposit of public money; that such pledges are *ultra vires,* void and recoverable at the suit of the receiver. On certiorari granted, the Supreme Court affirmed, 291 U. S. 262. This suit was instituted subsequent to this adjudication of the law in this manner.

Under the authorities cited, the pledge was *ultra vires.* This proposition the receiver has a right to assert. Nor is the receiver required to make restitution by paying the claim in full. The pledge fails because illegal and void and the creditor becomes entitled only to a dividend as a general creditor. *Texas & Pacific R. R.* v. *Pottorff,* 291 U. S. 245. Being void the transaction could not be confirmed, ratified, enforced or rendered enforcible by the application of any doctrine of estoppel or otherwise. *California Bank* v. *Kennedy,* 167 U. S. 362; *McCormick* v. *Market Bank,* 165 U. S. 538; *Central Transportation* v. *Pullman,* 139 U. S. 24. This is because, not merely that the bank ought not to make the contract, but that it could not legally make it. Ratification is impossible if there is no power to contract. *Central Transportation* v. *Pullman,* 139 U. S. 24. And knowledge

of the lack of existence of authority is conclusively presumed. *McCormick* v. *Market Bank,* 165 U. S. 538.

The receiver was the agent and administrative officer of the United States. *In re Chetwood,* 165 U. S. 443; *U. S.* v. *Weitzell,* 246 U. S. 533. Payments voluntarily made by officers of the United States, under a mistake of law, may be recovered. Thus where the Postmaster General, through a mistake as to the statutory law relative to payment for carrying the mails, overpaid the railroad company, which later sued for moneys due for services subsequently rendered, and the Postmaster General sought to set off the previous overpayment, made under mistake of law, the Supreme Court affirmed recovery, holding that the government cannot be bound by the actions of its officers under misconception of the law under which they have assumed to act, and that the question, in such instances, is whether the recipient may be allowed to retain the fruits not authorized by law, resulting from an erroneous conclusion by the agent of the government as to the legal effect of the particular statute, under or in reference to which he is proceeding, saying:

> "there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them." *Wisconsin Central R. R. Co.* v. *U. S.,* 164 U. S. 190.

See also *Talcott* v. *United States,* 23 F. (2d) 897; *Champ Spring Co.* v. *U. S.,* 38 F. (2d) 988, affirmed 47 F. (2d) 1.

Such payments are exceptions to the rule that money paid under mistake of law cannot be recovered. A private party may do as he desires with his own money, but an officer of the United States cannot bind his government in making payments contrary to law. *Heidt* v. *United States,* 56 F. (2d) 559. It follows, therefore, that appellant as receiver had a right to sue and recover what he had illegally paid under a mistake of law.

But it is said that the preferential payments had been made at the instance and with the approval of the comptroller. This in no wise alters the situation. In *Wisconsin Central R. R.* v. *U. S., supra,* the Supreme Court held the Postmaster General included within the class of those whose wrongful payment may be recovered. There is no reason why the comptroller should have any greater power to bind the government by approving a payment contrary to law. Such was the reasoning of the court in *O'Connor* v. *Rhodes,* 79 F. (2d) 146 (C. C. A.). There the previous payments were recovered, although they had been made at the instance and with the approval of the comptroller. The Supreme Court affirmed in 297 U. S. 383. A similar recovery was allowed in *Mays* v. *Wilkinson,* 12 F. Sup. 350. There was and there could have been no estoppel as to either the receiver or the comptroller which would work a binding effect upon the payment of money made by them as United States officers under misapprehension of the law.

It is asserted, however, that the complaint discloses that the payment was approved by the District Court. The language of the complaint in this respect is "that an order was duly entered in this court upon petition of plaintiff praying entry of said order authorizing sale of said assets." There is no showing that at that time the court had jurisdiction of any person other than the receiver or that it was dealing with anything other than an *ex parte* proceeding. The burden of defense is upon appellee; the trial court was bound to accept the averments of the complaint, construed most favorably toward appellant. The complaint discloses no adjudication as such between the parties and we cannot assume that an order of the court entered upon a petition of the receiver was one entered wherein appellee was a party and bound within the meaning of the doctrine of *res adjudicata,* until it appears that the parties were in court. There is no suit in the legal sense and no parties in the legal understanding of the term in such an *ex parte* proceedings,—no adjudication of issues between adversaries. Rather, under

the language of the complaint, we must assume that the receiver's petition was one such as is ordinarily utilized in procuring authorization of administrative actions by the receiver. No issue was adjudicated. 34 C. J. 763; *Kelly* v. *Milan*, 127 U. S. 139; *Fifer* v. *Williams*, 5 F. (2d) 286 (C. C. A. 9); *Hulse* v. *Argetsinger*, 18 F. (2d) 944 (C. C. A. 2); *Texas & Pacific* v. *Southern Pacific*, 137 U. S. 48. The order was the consequence of consent and not of judgment by the court. Consequently it could not be treated as *res adjudicata*. *Lawrence Manufacturing Co.* v. *Janesville Cotton Mills*, 138 U. S. 532; *San Francisco* v. *LeRoy*, 138 U. S. 656.

It follows that the complaint of the receiver, as an officer of the United States, for the recovery of money paid under misapprehension and misapplication of the statutory law, was sufficient. The motion to dismiss should have been denied. The judgment is reversed with directions to proceed in harmony with the views herein expressed.

A true Copy:
Teste:

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 32

IRON ROSS, as Receiver of The First National Bank of Perry, Florida, *Petitioner*,

v.

W. V. KNOTT, as Treasurer of the State of Florida, et al., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

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National Banking Act, Title 12 U. S. C. A.

Sect. 90, cited 2, 7, 14
Quoted in full in Appendix 21

Sect. 91, cited 19
Quoted in full in Appendix 21

Sect. 194, cited 20
Quoted in full in Appendix 22

Judicial Code, Sect. 240 (a); 28 U. S. C. A., Sect. 347.. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 32

IRON ROSS, as Receiver of The First National Bank of Perry, Florida, *Petitioner*,

v.

W. V. KNOTT, as Treasurer of the State of Florida, et al., *Respondents*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

I.

OPINIONS OF THE COURTS BELOW.

The Opinion and Order of the District Court are set out in the Record at pages 33 and 38 and are reported in 13 Fed. Supp. 963.

The Opinion of the Circuit Court of Appeals for the Fifth Circuit is found in the Record at page 53 and is reported in 87 Fed. (2) 817.

II.

JURISDICTION.

This Court has jurisdiction of this case under Judicial Code Sect. 240 (a), as amended by the Act of February 3, 1925, Title 28 U. S. C. A., Sect. 347, having granted on May 24, 1937, writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit to review the judgment of that court in this case. (R. 67) The judgment of the Circuit Court of Appeals to be reviewed was entered January 22, 1937. (R. 57)

III.

STATEMENT OF CASE.

The facts are not in controversy. The Receiver filed suit (R. 1) to set aside and have declared null and void certain pledges of assets made by the First National Bank of Perry, Florida, while a going concern, to secure various deposits of public money belonging to Taylor County, Florida, on the ground that said pledges of assets were made prior to the Enabling Act of June 25, 1930, c. 604, 46 Stat. 809; 12 U. S. C. 90, which Act for the first time authorized national banks to give security for public deposits of a state or political subdivision. Said Statute provides:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The First National Bank of Perry, Florida, was closed by the Board of Directors on October 18, 1930, (R. 9) and a Receiver was appointed by the Comptroller of the Currency on October 25, 1930 (R. 9).

On March 12, 1930, the bank pledged with and delivered to W. V. Knott (Treasurer of the State of Florida), as County

Treasurer Ex Officio of Taylor County, Florida, $10,000.00 par value County of Sarasota 5½% Highway Bonds as security for funds deposited (R. 5). On March 15, 1930, the bank also pledged with and delivered to said State Treasurer (as ex officio County Treasurer) for a similar purpose $10,000.00 par value Town of Perry Bonds (R. 6).

In 1929 and early in 1930 but not after May 2, 1930, the bank pledged with the Bond Trustees of Taylor County (the designation under which the account was carried prior to being taken over by the State Treasurer, as County Treasurer Ex Officio of Taylor County), securities consisting of mortgages, notes and bonds having a face value of $69,549.76 for the purpose of securing deposits of the Bond Trustees of Taylor County, which were assigned to W. V. Knott, State Treasurer, as Ex Officio County Treasurer of Taylor County on May 2, 1930 (R. 6, 19, 20). All of this last group of securities remained in the physical possession of the bank in trust for the pledgee (R. 19) until after closing (R. 7) when the Receiver delivered to Knott a portion of said collateral consisting of the bonds covered by the assignment of May 2, 1930, having a face value of $20,250.00 (R. 7).

It is conceded and assumed for discussion that under the law of Florida state banks had authority at the time the deposits in question were made with the First National Bank, to pledge their assets to secure deposits of the type and class now under consideration.

> "In Florida it has long been the law that state banks may give security for public deposits. First American Bank and Trust Company v. Town of Palm Beach, 96 Fla. 247".
>
> (Extract from opinion of court below, R. 55.)

Also see *Davis* v. *Knott*, 109 Fla. 60.

No new deposits of Taylor County funds and no additional pledges of assets to secure said deposits were made after the Act of June 25, 1930 became effective. (Opinion trial court, R. 36)

Dividends in the sum of $13,318.03 representing dividends of 19 per cent on the deposits have been paid Knott as Ex Officio County Treasurer (R. 8). From collections made on the pledged collateral remaining in his hands, the Receiver paid Knott as Ex Officio County Treasurer of Taylor County $20,759.31 (R. 8). Knott has collected $2,025.00 in interest from the collateral and $1,042.50 from the sale of a portion of the collateral in his hands (R. 8). Knott is still holding pledged assets having a face value of $39,250.00 (R. 9, 18, 21). The payments by the Receiver to the State Treasurer, as Ex Officio County Treasurer, resulted from a mistake by the Receiver of the applicable law. (R. 12.)

To prevent the threatened sale of the remaining pledged assets and the application of the proceeds toward payment of the claim and to recover the pledged assets or their proceeds, the Receiver filed suit in the District Court on December 9, 1935. Defendants filed motions to dismiss the bill of complaint (R. 22, 24, 26), which were granted by the District Court (R. 38). 13 Fed. Supp. 963. The District Court's Order was affirmed by the Circuit Court of Appeals. 87 Fed. (2) 817 (R. 57).

Both of the lower Courts held in effect that:

(a) The Enabling Act of June 25, 1930 *validated* the previous pledge agreements with respect to money deposited *before* the Enabling Act became effective.

(b) The fact that the moneys *were permitted to remain on deposit* from and after June 25, 1930, until the Bank closed on October 18, 1930 validated the pledges made prior to June 25, 1930.

IV.

SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE ARGUED.

(a) The Appellate Court erred in holding that the amendment of June 25, 1930, validated pledges by national banks made before that date as security for deposits of public money of a state or political subdivision made prior to June 25, 1930.

(b) The Appellate Court erred in not holding that the Act of June 25, 1930, could not be given a retroactive or retrospective operation in the absence of such an intention by the Legislature plainly expressed in the law.

(c) The Appellate Court erred in not holding that a contract beyond the power of a corporation to make cannot be made valid by a change in law not in force when the transaction was consummated.

(d) The Appellate Court erred in not holding that the law in force at the time a transaction is consummated determines its validity.

(e) The Appellate Court erred in not requiring the respondents to participate in the pro rata distribution provided by the National Bank Act.

V.

QUESTIONS INVOLVED.

The two principal questions involved are the following:

1. Did the Enabling Act of June 25, 1930, validate the previous pledge agreements with respect to money deposited before the Enabling Act became effective?

The Petitioner contends that the foregoing question should be answered in the negative.

2. Did the fact that the moneys were permitted to remain on deposit from and after June 25, 1930, until the Bank failed on October 18, 1930, validate the pledge agreements that were made prior to June 25, 1930?

The Petitioner contends that the foregoing question should be answered in the negative.

VI.

SUMMARY OF ARGUMENT.

(1) The courts have declined to apply Enabling Acts of the type involved in the instant case to deposits made before the Enabling Act became effective. There appear to be no cases to the contrary other than the decisions of the courts below.

(2) The law in force at the time a transaction is consummated determines its validity.

(3) Provisions of a statute added by amendment take effect only from the time of the amendment and are not considered as having been in force prior to the date of the amendment.

(4) Application of the *Enabling Act* of June 25, 1930, with respect to money deposited before the Enabling Act became effective would involve a retroactive application of the statute.

(5) The contract of a corporation which is ultra vires and beyond the corporate powers conferred upon it by the law-making body is not voidable only but wholly void. The contract cannot be ratified by either party. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. It is incapable of ratification by estoppel or otherwise. And knowledge of the lack of existence of authority is conclusively presumed.

(6) The State Treasurer, as Ex Officio County Treasurer, occupied the status of an unsecured creditor; payments to him from proceeds of collateral were preferential payments to an unsecured creditor made by the receiver which can be recovered.

VII.

ARGUMENT.

(1.)

Courts have uniformly declined to apply Enabling Acts of the type involved here to deposits made prior to the date the Enabling Acts became effective. There appear to be no cases to the contrary, other than the decisions of the courts below.

On June 25, 1930, Section 5153 of the Revised Statutes was amended, said amendment stating:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." c. 604, 46 Stat. 809, 12 U. S. C. 90.

It is now established that national banks prior to June 25, 1930, lacked the power to pledge assets as security for deposits of public money belonging to a state or a political subdivision of a state.

This court held in *Marion* v. *Sneeden*, 291 U. S. 262, 268:

> "A national bank could not legally pledge assets to secure funds of a State, or of a political subdivision thereof, prior to the 1930 amendment; and since then it can do so legally only if it is located in a State in which state banks are so authorized. In some States national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the State or of a political subdivision thereof; comptrollers of the currency knew that this was being done; and they assumed that the banks had the power so to do. But *the assumption* was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained."

See also:

Texas & Pacific v. *Pottorff*, 291 U. S. 245, 258, 259.
Lewis v. *Fidelity & Dep. Co. of Maryland*, 292 U. S. 559, 564, 570, 571.
Thompson, Receiver v. *Twin Falls Highway Dist.*, 17 Fed. Supp. 705, 706.
Webb v. *American Surety Co.*, 88 Fed. (2) 171, 173, 174.
Mays v. *Wilkinson*, 12 Fed. Supp. 350, 354, affirmed as to this point in *Queenan* v. *Mays*, 90 Fed. (2) 525, 532, 533.
Ross, Receiver v. *Lee, as Comptroller, et al.*, 15 Fed. Supp. 972, 973.
Collins v. *School District of Borough of Trafford*, 72 F. (2) 339, 340.
Utter v. *Eckerson*, 78 Fed. (2) 307, 309.
O'Connor v. *Rhodes*, 79 Fed. (2) 146, 149, 150.
Granzow v. *Village of Lyons*, 89 Fed. (2) 83, 85.
Capital Savings & Loan Ass'n v. *Olmypia Nat. Bank*, 80 Fed. (2) 561, 564, 565.
Rusch v. *Baer*, 18 Fed. Supp. 732, 733.
Citations in connection with the annotated case of *Lewis* v. *Fidelity & Dep. Co.*, 92 A. L. R. 803.
Citations in connection with annotated case of *People* v. *Wiersema State Bank*, 101 A. L. R. 515.

This position was again affirmed by this court in the case of *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564, the court finding, however, that although deposits had been made prior to the passage of the Act of June 25, 1930, nevertheless, at the time the bank closed the balance then on hand consisted entirely of new deposits made subsequent to the Act of June 25, 1930, and under the circumstances the lien of the State, attaching under the Georgia statutes, pursuant to the provisions of a continuing bond given as security for its deposits, was held to be effective. This court explicitly refrained from passing upon the status of deposits, and the security for deposits, made prior to the passage of the act and stated:

"We have no occasion to consider whether the Act of June 25, 1930, would have validated the lien also in respect to deposits made before that date."

The exact situation involved in the instant case arose in the case of *Thompson, Receiver* v. *Twin Falls Highway District*, 17 Fed. Supp. 705. In that case, the national bank receiver brought suit to recover the sum of $3,279.09 claimed to have been illegally paid by the former receiver of the bank from the proceeds of sale of pledged bonds which had been deposited with the County Auditor in 1929 to secure deposits of the Highway District in the bank made prior to June 25, 1930. The bank closed in 1931. The deposits were paid in full by the former receiver from the proceeds of the pledged bonds. The court held on page 706:

"It is obvious that the deposits made prior to June 25, 1930, are the only ones concerned here, and as the bank could not then pledge its assets to secure them, the moneys when then deposited became a part of the common fund of the Commercial Department of the bank and were subject to the same risks as moneys of all other persons who made deposits in the bank and no act of the parties thereafter could have been done which would have retroactively converted the common character of the deposits into preferred or secured deposits when the claimed security was prohibited by law, and therefore they are incapable of being ratified."

In *Wood* v. *Imperial Irrigation District*, 216 Cal. 748, 758, there was involved an analogous situation concerning the construction of a state statute which went into effect a few months before the state bank closed but after irrigation district funds had been deposited and secured by a pledge of assets. The new act which had thus been put in effect after the pledge and deposits were made and before closing of the bank, permitted the securing of irrigation district funds; and the question before the court was whether the original pledge contract was validated by the amendment to the depositary statute. The Supreme Court of Califor-

nia held that the original pledge was illegal, that the contract was not validated by the amendment to the depositary act, and that a contract void because it stipulates for doing what the law prohibits, is incapable of being ratified. The court further stated that the recognition of the contract by the parties for a long period after the act becomes legal does not constitute a ratification of the contract. The pertinent portions of the opinion at page 758 thereof follow:

> "We are of the view that the contract or agreement to pledge the bank's assets as security for the deposit made June 19, 1925, was illegal as an original transaction, being in contravention of section 21 of the Bank Act, which declares that 'the capital and assets of such bank are a security to depositors and stockholders, depositors having the priority of security over stockholders.' (See, also, section 27 of the Bank Act.) The only manner in which the priority of one depositor may be secondary to the right of another depositor is by statutory enactment, which does not exist in favor of appellant under the law as it existed when it made its said deposits. The contract was not validated by the adoption of the act of July 29, 1927. At the time said moneys were deposited with the bank they became a part of the common fund of the commercial department of said bank, subject to the same risks as the moneys of all other persons who made deposits in said commercial department. The relationship of debtor and creditor was created. Prior to the security transaction herein appellant had actually made deposits with said bank for which no security was taken. No attempt was made to reaffirm, ratify or bring the transaction within the purview of the act which became a law some two months and twelve days before the bank was taken over by the superintendent of banks, and no act could have been done by the parties to the transaction which would have retroactively converted the common character of said deposits into secured or preferred deposits. The funds had long since been disbursed through the commercial department as other depositors' funds had been disbursed. They were not then in the bank. No deposits were made within the time in which the irriga-

tion district was entitled to receive security for deposits, and only those bodies which made deposits and took security therefor under the express sanction of existing law were entitled to enjoy the extraordinary privilege provided by statute. A contract void because it stipulates for doing what the law prohibits is incapable of being ratified. The recognition of the contract for a long period after the act becomes legal does not constitute a ratification of the contract. (Handy v. St. Paul Globe Publishing Co., 41 Minn. 188, 16 Am. St. Rep. 695, 4 L. R. A. 466, 42 N. W. 872; Stevens v. Boyes Hot Springs Co., 113 Cal. App. 479, 298 Pac. 508; Robinson v. Contra Costa etc. Assn., 112 Cal. App. 252, 296 Pac. 922; Biggart v. Lewis, 183 Cal. 660, 671, 192 Pac. 437; Colby v. Title Ins. & Tr. Co., 160 Cal. 632, Ann. Cas. 1913 A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913.) Neither does such a contract create an estoppel. (Hedges v. Frink, 174 Cal. 552, 555, 163 Pac. 884; Colby v. Title Ins. & Tr. Co., *supra;* Tate v. Commercial Bldg. Assn., 97 Va. 74, 75 Am. St. Rep. 770, 45 L. R. A. 243, 33 S. E. 382)."

In three recent decisions of the Federal Courts involving the construction of the Act of June 25, 1930, it has been held that the Act did not validate pledges of assets made by national banks *where the bank closed before the Act of June 25, 1930, became effective,* (as distinguished from the situation where the bank remained open after June 25, 1930). *Webb* v. *American Surety Co.,* 88 F. (2) 171, 173, 174; *Ross* v. *Lee,* 15 F. Supp. 972, 973; *Mays* v. *Wilkinson,* 12 F. Supp. 350, 354, affirmed as to this point in *Queenan* v. *Mays,* 90 Fed. (2) 525, 532, 533.

In *Kavanaugh* v. *Fash,* 74 F. (2) 435, 437, it was held that the Enabling Act of June 25, 1930, vitalized a previously made pledge with respect to *money deposited after the Act became effective.* It appeared however that a new pledge of assets had been made to secure the deposits in question after June 25, 1930.

With the exception of the decisions in the instant case and the cases of *Thompson* v. *Twin Falls Highway District,*

supra, and *Wood* v. *Imperial Irrigation District, supra,* there appears to be no decisions by the Federal or State Courts construing the effect of the passage of an Enabling Act,—such as the Act of June 25, 1930,—on the question of the validity of pledges made *before* the Act became effective, to secure deposits *also* made *before* the Act became effective, where the bank continued open *after* the effective date of the Enabling Act.

(2.)

The law in force at the time a transaction is consummated determines its validity.

The pledge contracts in the instant case were made before the passage of the Act of June 25, 1930. No new contracts were entered into subsequent to the passage of the act and no new deposits under the original contracts were made. The pledges were therefore undoubtedly ultra vires and void under the decisions of this court in *Marion* v. *Sneeden, supra; Texas & Pacific Ry. Co.* v. *Pottorff, supra,* and *Lewis* v. *Fidelity & Deposit Co., supra.*

It is the position of the petitioners that the contracts or pledge agreements were void when entered into, and, being void, the subsequent passage of the Enabling Act of June 25, 1930, could not render valid the contracts which were invalid when made. In this connection, this court has held in *Memphis R. R. Co.* v. *Railroad Commissioners,* 112 U. S. 609, 623:

> "It is, of course, the law in force at the time the transaction is consummated and made effectual, that must be looked to as determining its validity and effect."

The Court of Appeals of the State of New York in the case of *People ex rel City of New York* v. *Nixon,* 229 N. Y. 356, 361, in an opinion handed down by Mr. Justice Cardozo held that:

"The obligation of a contract is determined by the law in force when it is made (McCracken v. Hayward, 2 How. (U. S.) 608, 612). There are times when, in the exercise of the police power, an obligation, once attaching, may be modified or destroyed. * * * That problem never arises when the power has been exerted before the contract has been made. Impairment is conceivable as the result of a statute passed thereafter. Impairment is inconceivable when, at the time of the contract, the statute is in force. * * * Statutes then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is."

Similarly, it was stated in the case of *Handy* v. *St. Paul Globe Publishing Co.*, 41 Minn. 188, 193:

"There is no conflict of decisions on the proposition that a contract, void because it stipulates for doing what the law prohibits, *is incapable of being ratified.* That is this case. The contract contemplated the doing what the law then in force prohibited, and for that reason it was void. It is true the law was so changed after the contract was made that, from the time of the change, it became, as plaintiff claims, lawful to do those things provided in the contract which were unlawful at the time it was made, and so that, as he claims, a contract like this, made after the change went into effect, would have been valid. *But that could not affect the validity of the previous contract, which was void from the beginning.* The parties might have made a *new* contract to commence on or after January 1, 1886; but, because of the illegality in it, they could not at any time ratify this contract from the beginning; and, because it is entire and indivisible, they could do nothing amounting to less than the making of a new contract, which could give vitality to it for the time since January 1, 1886. An entire contract must be ratified, if at all, as an entirety." (Italics inserted.)

It was likewise stated in the case of *Steffey* v. *Bridges*, 140 Md. 429, 434:

"The validity of the contract, therefore, must be determined by the postal laws in existence at the time it was made, and not by the subsequent modifications or changes thereof. In 9 Cyc., 576, it is said that if an agreement was illegal by statute or on grounds of public policy when it was made, it is not rendered legal by repeal of the statute or a subsequent change of the public or legislative policy. Schaun v. Brandt, 116 Md. 566; Stewart v. Thayer, 168 Mass. 519; Rich v. Keyser, 54 Pa. St. 86; Baltimore v. Cahill, 126 Md. 604; Smith v. State, 66 Mo. 215; Brager v. Bigham, 127 Md. 159."

For other cases likewise establishing the rule of law that a contract invalid when made is not rendered valid by a law enacted thereafter, see: *International Products Co.* v. *Vails Estate,* 97 Vt. 318, 325; *Schaun* v. *Brandt,* 116 Md. 560, 566; *Stewart* v. *Thayer,* 168 Mass. 519; *Puckett et al.* v. *Alexander,* 102 N. C. 95, 98; *Hughes* v. *Boone,* 102 N. C. 137, 164; *Denning* v. *Yount,* 62 Kans. 217, 220.

(3.)

Provisions of a statute added by amendment take effect only from the time of the amendment and are not considered as having been in force prior to the date of the amendment.

As heretofore pointed out (*supra,* p. 7) the Act of June 25, 1930, amending Section 5153 of the Revised Statutes permitted national banks *for the first time* to give security for deposits of public money belonging to a state or a political subdivision of a state. *Marion* v. *Sneeden, supra; Lewis* v. *Fidelity & Deposit Co., supra.* There is nothing in the amendment indicating that Congress intended that the provisions of the amendment should have a retroactive effect.

In the case of *McDougald* v. *New York Life,* 146 Fed. 674, 678, the Circuit Court of Appeals of the Ninth Circuit, quotes with approval the rule of interpretation of amend-

ments as set forth in Black on Interpretation of Laws (Section 133, pg. 359, 360) as follows:

> "When an amendatory act provides that the original statute shall be amended 'so as to read as follows,' and thereupon repeats some of the clauses or provisions of the amended statute and omits others, and at the same time introduces certain new clauses or sections, there are three points which must be chiefly noticed in regard to its operation and effect. In the first place, as to those portions of the original statute which the amendatory act simply retains, it is not generally to be construed as a new enactment. It does not repeal those provisions and then reenact them in the same terms, but they are to be considered as remaining in force from the time of the original enactment, and as being merely continued in operation by the amendatory statute. * * * In the second place, *those provisions which are newly added by the amendatory statute are not to be considered as having been in force from the beginning. They take effect from the time of the enactment of the amendatory act, and derive their whole efficacy and vitality from the amending law, and not from that amended.* * * * In the third place, all those provisions of the original statute which are not repeated in the amending statute are abrogated or repealed thereby, and are thereafter of no force or effect whatever." (Italics inserted.)

(4.)

Application of the Enabling Act of June 25, 1930, to money deposited before the act became effective would involve a retroactive application of the Enabling Act.

Both of the lower courts seem to have been confused by the following language of this Court as contained in the case of *Lewis* v. *Fidelity & Deposit Company*, 292 U. S. 559, 571:

> "A statute is not retroactive merely because it draws upon antecedent facts for its operation."

The lower courts evidently construed this language to mean that it would not render the Act of June 25, 1930, re-

troactive to apply it to deposits under a pledge agreement notwithstanding both the pledge and the deposits thereunder were made prior to the operative date of the statute.

We think that what *this* court meant in the Lewis case is, that it would not render the Act of June 25, 1930, retroactive to apply it to deposits that *were made after the operative date of the amendment for the unexpired period of a continuing agreement for security which was executed prior to the operative date of the Act.* The antecedent facts to which reference was made by this Court were: the existence of a depository bond, executed for a term of four years by a national bank in July, 1928, which was given pursuant to the provisions of a state statute providing that the bond shall be secured by a general lien on the bank's assets. This court held in effect that as the bond had not expired when the Act of Congress which authorized the same became operative, the application of the Act of June 25, 1930, to deposits made *thereafter* in pursuance of the continuing agreement for security did not render the statute retroactive in effect.

All of the deposits in the case now before the court, however, were made *prior* to June 25, 1930, under pledge agreements which were made prior to June 25, 1930, and to apply the statute to deposits made prior to the operative date of the amendment under pledge agreements which were made prior to the operative date of the amendment, would render the statute retroactive in its application.

In the case of *National Liberty Ins. Co.* v. *Bank of America,* 214 N. Y. Supp. 643, 652, the Supreme Court of New York quotes with approval the rule of statutory construction as to retroactive effect set forth in *Johnston* v. *United States,* 17 Court of Claims, 157 at page 171, as follows:

> "A statute does not operate retrospectively when it is made to apply to future transactions, merely because those transactions have relation to and are founded upon antecedent events."

The rule is stated by the Supreme Court of Michigan in the case of *Clearwater Township* v. *Board of Supervisors*, 187 Mich. 516, 521, as follows:

> "A law is not retrospective in a sense forbidding it because a part of the requisite for its action and application is drawn from a time antedating its passage."

As to the Amendment of June 25, 1930, any construction other than the one for which plaintiff contends, would have the effect of bringing into existence a new obligation, thereby impairing vested rights. *Cox* v. *Hart*, 260 U. S. 427, 435.

The general rule as to retrospective construction is well stated in the case of *Western Pac. R.* v. *Baldwin*, 89 Fed. (2) 269, 273 as follows:

> "The question is certainly not free from doubt, but a general rule of statutory construction followed by the federal courts is 'that a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' United States v. Heth, 3 Cranch. 399, 413, 2 L. Ed. 479, 483; Reynolds v. McArthur, 2 Pet. 417, 7 L. Ed. 470; United States v. American Sugar Refining Co., 202 U. S. 563, 577, 26 S. Ct. 717, 50 L. Ed. 1149, 1152; Winfree, Adm'r. v. Northern Pac. Railway Co., 227 U. S. 296, 33 S. Ct. 273, 57 L. Ed. 518; Union Pac. R. Co. v. Laramie Stock Yards Co., 231 U. S. 190, 199, 34 S. Ct. 101, 102, 58 L. Ed. 179; Gordon v. Empire Gas & Fuel Co. (C. C. A. 5) 63 F. (2d) 487, 489; Jones v. Fidelity & Columbia Trust Co. (C. C. A. 6), 73 F. (2d) 446, 447."

In the *U. S. Fidelity & Guaranty Co.* v. *United States*, 209 U. S. 306, 314 it is said:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a con-

> struction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

In the case of *Harvey* v. *Tyler*, 69 U. S. 328, 347, it was held:

> "And it is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

(5.)

A contract of a corporation which is ultra vires and beyond the corporate powers conferred upon it by the law-making body is not voidable only but wholly void. The contract cannot be ratified by either party. No performance on either side can give the unlawful contract any validity or be the foundation of any action upon it. It is incapable of ratification by estoppel, or otherwise. And knowledge of the lack of existence of authority is conclusively presumed.

This court, in many decisions, has sustained the proposition that a contract of a corporation which is ultra vires and beyond the powers conferred upon it by the law-making body is not voidable only, but is *wholly* void. Such a contract cannot be ratified by either party. No performance by either party can give the unlawful contract any validity or be the foundation of any right of action upon it. It is incapable of ratification, confirmation or enforcement by the application of any doctrine of estoppel or otherwise and knowledge of the lack of existence of authority is conclusively presumed. *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 260; *California National Bank* v. *Kennedy*, 167 U. S. 362, 371; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 553; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 59; *Granzow* v. *Village of Lyons*, 89

F. (2) 83, 85; *Awotin* v. *Atlas Exchange National Bank*, 295 U. S. 209, 213.

(6.)

The State Treasurer, as Ex Officio County Treasurer, occupied the status of an unsecured creditor; payments to him from proceeds of collateral were preferential payments to an unsecured creditor made by the Receiver which can be recovered.

The pledge of assets being ultra vires and void, the national bank receiver is entitled to recover the assets or their proceeds on behalf of all creditors of his trust. *Marion* v. *Sneeden*, 291 U. S. 262, 272; *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, 261; *O'Connor* v. *Rhodes*, 79 F. (2) 146, 152; *Webb* v. *American Surety Company*, 88 F. (2) 171, 174; *Granzow* v. *Village of Lyons*, 89 F. (2) 83, 85, 86; *Ross* v. *Lee*, 15 F. Supp. 972, 974; *Mays* v. *Wilkinson*, 12 F. Supp. 350, 355; *Queenan* v. *Mays*, 90 Fed. (2) 525, 532, 533; *Thompson* v. *Twin Falls Highway District*, 17 Fed. Supp. 705, 708; *Faircloth* v. *City of Atlantic City*, 16 F. Supp. 131, 132; *Adams* v. *Cribbis*, 17 F. Supp. 723, 725; *Fidelity & Casualty Co.* v. *Allen*, 84 Fed. (2) 53, 54; *Rusch* v. *Baer*, 18 F. Supp. 732, 734; *Griffin* v. *Royall*, 70 Fed. (2d) 103, 104.

Furthermore, if the pledges were invalid for want of power on the part of the bank to make, the delivery by the Receiver after closing of the bank of a portion of the pledged assets and the payment to the State Treasurer of proceeds derived from the collections made on the pledged assets after suspension of the bank by the Receiver, constituted a transfer of assets after the commission of an act of insolvency, in violation of the provisions contained in Section 5242 of the Revised Statutes (Appendix pg. 21) and such preferential transfers of assets may be recovered by the Receiver of the insolvent national bank. *Mechanics Universal Joint Co.* v. *Culhane*, 299 U. S. 51, 58.

The State Treasurer as Ex Officio County Treasurer of Taylor County is a common or general creditor of the bank;

entitled only to dividends on his claim the same as any other creditor of the insolvent bank, in accordance with the provisions contained in Section 5236 of the Revised Statutes (Appendix Page 22). *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, 262; *Cook County National Bank* v. *United States*, 107 U. S. 445, 448, 449.

To sustain the pledges would be inconsistent with the provisions of the National Bank Act which are designed to insure in case of disaster uniformity in the treatment of depositors and a ratable distribution of assets. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 287; *Cook County National Bank* v. *United States*, 107 U. S. 445, 448, 449.

CONCLUSION.

The pledges of assets were made and the deposits for which the assets were pledged as security were also made before the date on which the Enabling Act of June 25, 1930 permitted the securing of such deposits by national banks. It is the contention of the petitioner that the pledges to secure the old deposits, being void for want of power on the part of the bank to make, *could not become effective without giving retroactive construction to the Act of June 25, 1930,* contrary to the intention of Congress as expressed in the Act. No new deposits having been made of County funds with the bank after June 25, 1930, the pledges cannot be upheld as valid. The petitioner asserts that the judgment of the Circuit Court of Appeals recognizing the validity of the pledges here in question should be reversed by this Court.

Respectfully submitted,

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GEORGE P. BARSE,
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Of Counsel.

APPENDIX.

Title 12 U. S. C. A., Sec. 90 (R. S. Sec. 5153)

DEPOSITARIES OF PUBLIC MONEYS AND FINANCIAL AGENTS OF GOVERNMENT. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: Provided, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: Provided, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. (Act of Mar. 3, 1901, c. 871, 31 Stat. 1448; Mar. 4, 1907, c. 2913, Sec. 3, 34 Stat. 1290; Dec. 23, 1913, c. 6, Sec. 27, 38 Stat. 274; Aug. 4, 1914, c. 225, 38 Stat. 682; June 25, 1930, c. 604, 46 Stat. 809).

Title 12 U. S. C. A., Sec. 91. (R. S. Sec. 5242)

TRANSFERS BY BANK AND OTHER ACTS IN CONTEMPLATION OF INSOLVENCY. All transfers of the notes, bonds, bills of ex-

change, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgment or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Title 12 U. S. C. A., Sec. 194. (R. S. Sec. 5236)

DIVIDENDS ON ADJUSTED CLAIMS; DISTRIBUTION OF ASSETS. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 32.

IRON ROSS, as Receiver of The First National Bank of Perry, Florida, *Petitioner*,

v.

W. V. KNOTT, as Treasurer of the State of Florida, et al., *Respondents*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

J. TURNER BUTLER,
Attorney for Petitioner.

GEORGE P. BARSE,
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Of Counsel.

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REPLY BRIEF FOR PETITIONER.

I.

FURTHER DISTINCTIONS BETWEEN THE LEWIS CASE AND THE INSTANT CASE.

A substantial portion of Respondent's brief is devoted to attempting to show that the situation in the case of *Lewis, Receiver,* v. *Fidelity & Deposit Company of Maryland,* 292 U. S. 559, is almost exactly analogous in facts and *in principle to the instant case. Petitioner submits that* there is a very substantial difference in both respects.

In the Lewis case, as in the instant case, it was within the power of the bank to accept the deposit. In the Lewis

case the bank also gave a bond as required by state statute with surety, to guarantee the repayment of the deposit. The giving of the bond by the bank, undertaking to repay the deposit, constituted no more than a reiteration, in the form of a written contract or obligation, to do what it impliedly agreed to do at the time it accepted the deposit, to wit, to repay the same on demand as in other cases of deposit, and hence, we may assume, for purposes of discussion, that it was not beyond the power of the bank to give a bond nor in fact to give a surety bond. The situation at that point was that the other incident, to wit, the attaching of a lien upon the assets of the bank in consequence of giving of the bond, was ineffective, for the obvious reason that the state statute could not impose a lien upon the national bank's assets contrary to the National Banking Law, and hence the state statute attempting to impose such lien was simply inoperative.

However, it is an entirely different thing to dissipate the bank's existing assets by way of a pledge of them to secure a deposit contrary to law. This distinction is accurately depicted in the case of *Texas and Pacific Railway Company* v. *Pottorff*, 291 U. S. 245, 256, where this Court said, with reference to this distinction:

> "The fact that this bank had frequently secured private deposits by surety bonds lends no support to the contention that the power to pledge assets is necessary to carrying on the business of deposit banking. Such a practice would likewise be a departure from the policy of equal treatment of depositors; but the loss to other depositors resulting from such action would be far less serious. *A pledge withdraws capital assets, while the giving of a surety bond merely increases the bank's expenses.*" (P. 256; Italics inserted.)

Hence in the instant case the ultra vires pledging of assets to secure deposits in the First National Bank of Perry, Florida, in 1929 and 1930, prior to the Act of June 25, 1930, (12 U. S. C. 90) constituted, in the light of the *Texas and*

Pacific Railway v. *Pottorff case,* and *City of Marion* v. *Sneeden,* 291 U. S. 262, *an illegal dissipation of the assets of the bank,* as distinguished from a bond guaranteeing repayment of deposits.

Applying by analogy the doctrines established by this Court in the case of *Corsicana National Bank* v. *Johnson,* 251 U. S. 68, 86-87, the illegality attached to the transaction, *and the damage and injury to the bank became complete, the very moment of the dissipation of the assets under the pledge contract.* As stated in the Corsicana case (pages 86-87):

> "(5) Assuming the Fleming and Templeton notes were found to represent an excessive loan, knowingly participated in or assented to by defendant as a director of the Bank, in our opinion *the cause of action against him accrued on or about June 10, 1907, when the Bank through his act parted with the money loaned,* receiving in return only negotiable paper that it could not lawfully accept because the transaction was prohibited by Section 5200, Rev. Stats. *The damage as well as the injury was complete at that time,* and the Bank was not obliged to await the maturity of the notes, because immediately it became the duty of the officers or directors who knowingly participated in making the excessive loan to undo the wrong done by taking the notes off the hands of the Bank and restoring to it the money that had been loaned. Of course, whatever of value the Bank recovered from the borrowers on account of the loan would go in diminution of the damages; but the responsible officials would have no right to require the Bank to pursue its remedies against the borrowers or await the liquidation of their estates. The liability imposed by the statute upon the director is a direct liability, not contingent or collateral." (Italics inserted)

Under the doctrine of that case the assets remained illegally dissipated so long as they were outstanding. Hence it follows that the enactment of the statute of June 25, 1930 authorizing *future transactions* whereby the bank could

give security for repayment of deposits of public money of a state or political sub-division, could have no possible effect by way of validating a *previous* illegal dissipation of the bank's assets.

On page 34 of his brief Respondent seems to urge that the Act of June 25, 1930 cured the invalidity of the pledge contracts in the instant case, and says:

> "In support of this view, we feel that it should be borne in mind that this court has frequently held that *the invalidity of a contract made by a corporation in excess of its chartered powers may be cured by a subsequent act of the legislature, and that the contract is by such subsequent act, made as valid as if it had been originally authorized.* This clearly demonstrates that the want of legislative authority to enter into a contract *affects the remedy merely* and does not affect the *existence* of the contract itself. This would seem to follow because of the fact that the legislature would have no power to create a contract between the parties where there had been none before. That such vitality can be breathed into an original ultra vires contract, see the cases of Gross v. U. S. Mortgage Company, 108 U. S. 477, 488, 27 L. Ed. 795, 798; *West Side Belt* R. R. Co. v. Pittsburgh Construction Company, 219 U. S. 92, 55 L. Ed. 107; Charlotte Harbor & N. R. Co. v. Wells, 260 U. S. 8, 67 L. Ed. 100." (Italics inserted)

In response to the foregoing it may be observed, *first,* that the contracts or pledge in the instant case were absolutely void and constituted an illegal dissipation of assets, and remained such so long as the pledged assets were outstanding, and *second,* the cases above cited by Respondent involve statutes which were, either in express terms, or were construed to be, retrospective in operation, and curative of past *acts or transactions.* Obviously the Act of June 25, 1930 is not a statute of this type and it is clear from the Lewis case that it was intended to be prospective in operation, and to relate only to future transactions. As this Court said in that case:

"The appointment was within the power of the State to confer and of the bank to accept, but by reason of the paramount federal law one of the anticipated incidents of the relation, the lien, could not arise. When that obstacle was removed by the Act of June 25, 1930, *the original agreement could as to the future* be given the effect intended by the parties; and the lien became operative *as to deposits thereafter made and is entitled to priority from the date of the Act. A statute is not retroactive merely because it draws upon antecedent facts for its operation.* Compare Cox v. Hart, 260 U. S. 427, 435; Ewell v. Daggs, 108 U. S. 143; Petterson v. Berry, 125 Fed. 902; Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 62 Fed. 904; 910; Rosenplanter v. Provident Savings Society, 96 Fed. 721. It was not necessary to go through the form of executing a new bond. Compare Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 627. We have no occasion to consider whether the Act of June 25, 1930, would have validated the lien also in respect to deposits made before that date: Compare Gross v. United States Mortgage Co., 108 U. S. 477, 488; West Side Belt R. Co. v. Pittsburgh Construction Co., 219 U. S. 92; Charlotte Harbor & Northern Ry. Co. v. Welles, 260 U. S. 8." (Pp. 570-571; Italics inserted.)

It is obvious from the foregoing quotation:

First, that this Court considered that the Act of June 25, 1930 was *not* retroactive,—"A statute is not retroactive merely because it draws upon antecedent facts for its operation";

Second, that the bond contract was considered analogous to a mortgage or lien for *future advances* (citing in that connection *Jones* v. *Guaranty and Indemnity Company,* 101 U. S. 622, 627), and hence although the bond contract was ineffective until the advancements were made, when the advancements were *thereafter* made, that is to say, when the future deposits after the Act of June 25, 1930, were made, the lien could come into operation from the first effective date of the bond contract so far as its lien aspect was con-

cerned, to wit, from June 25, 1930, the date of passage of the enabling act.

It is true that this Court in the Lewis case said:

> "We have no occasion to consider whether the Act of June 25, 1930, would have validated the lien also in respect to deposits made before that date."

Petitioner reiterates, however, (in addition to what has just been said about the statute not being retroactive) that inasmuch as the instant case involves an actual illegal dissipation of assets through the ultra vires and void pledge contracts, certainly this situation is radically different, both in facts and legal effect, from the situation in the Lewis case where no assets of the bank had been dissipated by illegal pledge contracts *and where the bond contract did not and could not and had not dissipated or jeopardized the bank's assets,* and where the only question before the Court was the validity of the *future* deposits.

Certainly Congress never intended by the Act of June 25, 1930, to validate previous illegal dissipations of assets by the bank any more than it would intend, by enlarging the loan limits of a bank by amending Section 5200 U. S. R. S. (12 U. S. C. Sec. 84) relating to excessive loans, to thereby validate, by said amendment, previous illegal loans that were in excess of the permitted limits of the statute made prior to the amendment.

II.

THE PROCEDURAL STATUS OF THE CASE WOULD SEEM TO REQUIRE ITS REVERSAL FOR A HEARING UPON THE FACTS.

It must be borne in mind that the instant case is before this Court solely upon the pleadings, that is to say, upon the bill of complaint (R. pp. 1-22), and the motions to dismiss (R. 22-33).

The bill of complaint clearly sets forth illegal pledges of assets in 1929 and 1930 prior to the passage of the Act of June 25, 1930. The motion to dismiss necessarily admits those facts.

Hence it seems obvious that upon its face the bill of complaint stated a good cause of action, to wit, illegal dissipation of the assets by a pledge of the same to secure deposits prior to the Act of June 25, 1930. The motion to dismiss could not and did not set up extraneous facts contraverting that situation. Hence the trial court most certainly should have overruled the motions to dismiss and required the filing of an answer to bring out the facts. Those facts might have disclosed whether or not there was a new contract between the parties, or whether under all the facts and circumstances involved a new contract could be implied between the parties, etc.

In this connection may be noted the following language in the opinion of the trial court:

> "After the adoption of the Amendment of June 25, 1930, it is true that no deposits were made by the State Treasurer in the instant case, but there was a balance on deposit which remained due and unpaid until the Bank closed its doors in the latter part of October, 1930. *It is true, according to the allegations of the Bill, that the State Treasurer made no further deposits and that he did not call on the Bank to repledge its securities, but that he contented himself with the security pledged prior to the Amendment;* * * *" (R. pp. 36-37; italics inserted.)

Nothing appears in the bill of complaint averring or indicating the above quoted facts; apparently they were oral statements of counsel during the argument of the motion to dismiss, indicating such to be the facts, as seemingly otherwise the Court would not have made such statements in its opinion. Assuming for discussion that such oral statements were made during the course of the argument in the trial court, it is obvious that the disposition of the

case on its merits should not have been founded upon such statements, without evidence upon all of the facts relating thereto preceded by an answer setting forth the averments of fact intended to be relied upon by Respondents.

Considered from the standpoint of the merits, and aside from the procedural point, *and assuming for discussion only that the evidence would show* the ultimate facts to be as recited in the foregoing extract from the Trial Court's opinion:

> "that the State Treasurer made no further deposits and that he did not call on the bank to repledge its securities, but that he contented himself with the security pledged prior to the amendment * * **" (R. 36-37).

it is the position of petitioner that the pledge contracts, and the dissipation of assets thereunder, being illegal at the time made, remained illegal, and that merely leaving the money on deposit, without further action by either the bank or the depositor, did not change the status of illegality and that the Act of June 25, 1930, not being retroactive, did not cure the pre-existing illegality and consequently the Receiver is entitled to recover.

III.

ESTOPPEL AND THE EQUITIES.

Respondents were depositors in the bank. As such their equities are no greater than the equities of the general depositors of the bank. No principle of estoppel operates to prevent the recovery of the money by the receiver. As stated in *Texas & Pacific Railway Co.* v. *Pottorff, supra:*

> *"But even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge.* The unauthorized pledge reduced the assets available to the general creditors. It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the as-

sets available for the general creditors, even though the corporation itself was not in position to do so.

"Third. The receiver may assert the invalidity of the pledge *without making restitution by paying the pledgee's claim in full.* * * * The pledge here challenged having failed because illegal, the Railway is entitled only to a dividend as a general creditor. Its right thereto is conceded." (Opinion pages 260-61. Italics inserted.)

The respondents are in no position to stand upon the fact that after the passage of the Act of June 25, 1930, the bank took no steps to recover the illegally pledged assets. Respondents were equally under obligation to restore to the bank the dissipated assets. If any question of guilt is involved, certainly respondents and the bank were in pari delicto.

It is respectfully submitted that the decision of the court below should be reversed.

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Attorney for Petitioner.

GEORGE P. BARSE,
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Attorneys for the Comptroller of the Currency,
Of Counsel.

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In The

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IRON ROSS, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws,

Petitioner,

v.

W. V. KNOTT, as Treasurer of the State of Florida, W. V. KNOTT, Treasurer of the State of Florida, as ex officio County Treasurer of Taylor County, Florida, etc., et al.,

Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

---

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In The

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No. 911

IRON ROSS, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws,

Petitioner,

v.

W. V. KNOTT, as Treasurer of the State of Florida, W. V. KNOTT, Treasurer of the State of Florida, as ex officio County Treasurer of Taylor County, Florida, etc., et al.,

Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

I.
OPINIONS OF THE COURTS BELOW

The opinion and order of the District Court appear at pages 44 and 50 of the printed record, and are reported in 13 F. Supp. 963. The opinion of the Circuit Court of Appeals appears in the record at page 69, and is reported in 87 F. (2d) 817.

II.
STATEMENT

We prefer to restate the facts.

In the latter part of 1929 and early part of 1930, and

NOTE: Any emphasis appearing in this brief is supplied.

as shown in part by receipt dated May 2, 1930, appearing as Exhibit 3 to the bill of complaint (R. 25), assets of the First National Bank of Perry, Florida, were delivered to the Bond Trustees of Taylor County, Florida, as security for the safekeeping and prompt payment of public funds of the county. As shown by the receipt which was, by reference, made part of the bill of complaint (R. 8, 25), these assets were *conditionally* redelivered to the bank, to be by it held in trust and segregated. This collateral was "to be released to the bank only by and with the consent of said Board of Bond Trustees, their successors, or assigns, *so long as said funds remain on deposit*" (R. 25). Upon the passage of Chapter 14486, Laws of Florida, Acts of 1929, which created a State Board of Administration to administer the interest and sinking funds of county road and bridge bonded indebtedness and supplementary revenues made available by law, the Bond Trustees, acting pursuant to Section 3 of said act, assigned the collateral to W. V. Knott, State Treasurer, as County Treasurer ex-officio.

On March 12, and March 15, 1930, respectively, other collateral was delivered to the State Treasurer, as County Treasurer ex-officio, to secure any deposits (R. 7, 23) (R. 7, 24) made, or to be made, in said capacity. This collateral was continuously held by him.

In late October, 1930, the bank closed and Ross, the petitioner here, was appointed Receiver. He thereupon delivered some of the collateral so conditionally left with the bank, to said Knott; collected upon a portion of the remainder, remitting the proceeds thereof for application on unpaid balances of such deposits; and retained an uncollected portion, never questioning the terms of the receipt under which the collateral was held segregated and in trust by the bank.

More than five years after the bank closed, Ross, as Receiver, on December 11, 1935, at the direction of the Comptroller of the Currency, filed bill of complaint (R. 1-29), attacking in general the right of defendants to assert any claim against the collateral as security for unpaid balances of public funds of Taylor County on hand with the bank when it closed. The prayer of the bill appears at pages 19 to 22 of the printed record.

Motions to dismiss the bill of complaint were separately filed by Taylor County (R. 30) and by the remaining defendants (R. 32). Thereafter, by leave of Court and before hearing, additional grounds of their motion to dismiss, together with supplemental motions to dismiss parts of the bill, were filed by the last named defendants (R. 35).

In an opinion rendered February 29, 1936 (R. 44) and reported in 13 F. Supp. 963, the District Judge held that the bill of complaint was without equity, since State banks in Florida were at all times authorized to give such security; the agreements were continuing ones; any obstacle to giving effect to the intention of the parties was removed by the Act of June 25, 1930, amending the National Banking Act; from that day to the closing of the bank in late October, no attempt was made by the bank to reclaim the collateral, although the State law in effect required, and the Federal law then authorized, security to be given. Accordingly, it was held that the collateral stood as security for unpaid balances of such deposits remaining with the bank after the amendment and on hand when it closed. Consequently, decree was entered dismissing the bill (R. 50). The Receiver prosecuted his appeal to the Circuit Court of Appeals, which affirmed the decree of the lower Court, the opinion appearing at pages 69, *et seq.* of the printed record, and

being reported in 87 F. (2d) 817. The Receiver has filed petition for writ of certiorari in this Court.

III.
THE QUESTION PRESENTED

We submit that the question presented is not whether the Act of June 25, 1930, was retroactive in effect; but, rather, whether under the circumstances stated the discretion of the two lower Courts in holding that it was inequitable to allow rescission should be disturbed, it appearing that the obstacle to giving effect to the intention of the parties was removed by the Act of 1930, and that the liens asserted were only as to balances of deposits remaining with the bank when it closed in late October of 1930.

IV.
ARGUMENT

The Act of June 25, 1930, provided:

> "Any assoication may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located, in the case of other banking institutions in the State."
>
> c. 604, 46 Stat. at L. 809, 12 U. S. C. 90.

It has been admitted throughout that State banks in Florida were at all times authorized to give security of the kind in question.

See

First American Bank & Trust Co. v. Palm Beach, 96 Fla. 247, 117 So. 900, 65 A. L. R. 1398;
Davis v. Knott, 109 Fla. 60, 147 So. 276.

This Court has spoken three times relative to the Act of 1930.

Texas & Pacific Railroad Co. v. Pottorff, 291 U. S. 245, 78 L. Ed. 777;

City of Marion v. Sneeden, 291 U. S. 262, 78 L. Ed. 787;

Lewis v. Fidelity & Deposit Co., 292 U. S. 559, 78 L. Ed. 1425.

In only one of the cases had there been any change in the existing law as to the bank's authority. In both the *Marion* and *Pottorff* cases the type of action originally ultra vires remained so because the amendment conferred no new authority. In the *Lewis* case a change was wrought in the corporate authority by the amendment. In that case the Court gave effect to the intention of the parties from the effective date of the amendment. Cases such as

Smith v. B. & O. R. R. Co. (D. C. W. D. Pa.), 48 F. (2d) 861;

B. & O. R. Co. v. Smith (C. C. A. 3), 56 F. (2d) 799;

Texas & P. R. Co. v. Pottorff, 291 U. S. 245, 78 L. Ed. 777;

Griffin v. Royall (C. C. A. 4), 70 F. (2d) 103;

Eckerson v. Utter (D. C. Idaho), 7 F. Supp. 201;

Spradlin v. Royall Mfg. Co. (C. C. A. 4), 73 F. (2d) 776;

Utter v. Eckerson, 78 F. (2d) 307;

Harrell v. Lawhead (D. C., N. D., W. Va.), 13 F. Supp. 298;

Phelps v. Citizens Union Nat'l. Bank (D. C., W. D. Ky.), 13 F. Supp. 623;

Calcasieu Nat'l. Bank v. Bank of Abbeville & Trust Co. (C. C. A. 5), 83 F. (2d) 742;

City of Marion v. Sneeden, 291 U. S. 262, 78 L. Ed. 787;

Faircloth v. Atlantic City (D. C., N. D., N. J.), 16 F. Supp. 131;

O'Conner v. Rhodes (Ct. of App., D. C.), 79 F. (2d) 146,

have no direct application, because the amendment conferred no new authority; and had the Courts given effect to the intention of the parties, the result would have been to allow the parties to do indirectly that which *at no time* could be done directly.

Cases such as

Mays v. Board of County Comm'rs. Creek County (*Okla.*), 23 Pac. (2d) 664;

Mays v. Wilkinson, 12 F. Supp. 350;

Ross v. Lee (D. C., S. D. Fla.), 15 F. Supp. 972,

have no direct application, because insolvency had supervened prior to June 25, 1930, and the rights of the parties had become fixed before the amendment.

Cases such as

F. & D. Co. v. Kokrda (C. C. A. 10), 66 F. (2d) 641;

Haynes v. City of Woodward (D. C., W. D. Okla.), 6 F. Supp. 270;

Lewis v. Fidelity & Deposit Co., 292 U. S. 559, 78 L. Ed. 1425;

Collins v. School Dist. of Borough of Trafford (C. C. A. 3), 72 F. (2d) 339;

Kavanaugh v. Fash (C. C. A. 10), 74 F. (2d) 485;

Hellawell v. Town of Hempstead (D. C., E. D. N. Y.), 10 F. Supp. 771;

Standard Inv. Co. v. Town of Snow Hill (C. C. A. 4), 78 F. (2d) 33,

while not all precisely in point, are helpful in their analyses.

The *Lewis* case went further than it was necessary to go in this case, for: the bond required of National banks was double that required of State banks; the lien allowed to be enforced was general, and not limited to specific assets; it attached not only to assets owned at the time of the deposits, but to after-acquired assets, including those captured upon insolvency by the receivership; it was in form security for the bond, and not for the deposits made; it was allowed against assets in the hands of the Receiver; and not, as here, against assets in the actual or constructive possession of the public authorities. *Furthermore, the right in that case asserted was* one arising by assignment and subrogation after the surety had paid the public authorities and had taken an assignment of their rights, which it was asserting.

The similarity of the *Lewis* case and this is striking. In both the lien was contractual, and did not arise *proprio vigore* any statute. The arrangement between the parties originally could not be given effect in its entirety, solely because of the obstacle of the paramount Federal law. The lien in the *Lewis* case could arise only upon the giving of bond; that in this case, only upon the making of deposit. But the only bond given was in 1928. If not necessary to execute a new bond in that case, it was similarly unnecessary to go through the form of

withdrawing and redepositing the unpaid balances of deposits and of redelivering the collateral in this. In neither case was retroactive construction necessary; because insolvency occurred only after June 25, 1930. No rights of third parties having in the meantime vested, the intention of the parties could be given effect from and after June 25, 1930. In the *Lewis* case, though the moneys in question had been deposited *after* the amendment, the lien was allowed priority *from the date thereof.* In neither case was the relationship a closed transaction with the making of original deposits; in both instances it was contemplated that there would be continuous dealings so long as, and to the extent that, balances should remain on deposit, the lien to be measured by unpaid balances from time to time on deposit with the bank. In each case there was a continuing intention that security exist; and in each the Court gave effect to the intenton as soon as that could be done consistent with paramount Federal law.

Though in the *Lewis* case, the deposits involved were made after the amendment, the lien was allowed effect from the date of the amendment. The question reserved was as to whether a lien had also existed as to the deposits made before the amendment. This question is not involved here, but would be involved if it were attempted to assert that any lien had existed before June 25, 1930.

It was not necessary to go through useless formality.

Ewell v. Daggs, 108 U. S. 143, 27 L. Ed. 682.

Respondents had acted in good faith, had been misled by prior administrative rulings of the Comptrollers of the Currency, and did nothing with fraudulent intent, or in contemplation of insolvency. Public officials are presumed, absent a showing to the contrary, to perform

their duties under the law. The legislatively established public policy of the State of Florida required the Treasurer to exact security. The bank enjoyed power to give it after June 25, 1930.

It could make no difference that some of the collateral for convenience of handling was redelivered to and held segregated by the bank. Respondents still held constructive possession and the right to actual possession.

Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568.

In this situation, respondents were continued in the possession, either actual or constructive, of the collateral, and allowed to think they were secured. If, having the power, the bank did not wish the collateral to be impressed with a lien, it was its duty, in equity and conscience, to advise the respondents, so that the deposits might be withdrawn, as the Court must surely have presumed that they would have been, because of the presumption above referred to, as to the performance of legal duties by public officials.

> "The laws governing the operation and management of banks ought not to be construed to show a greater solicitude for the protection of general depositors in a bank than in the protection of trust funds * * * deposited with the bank, which in fact are the funds of the taxpayers, assessed and collected for a public purpose * * *."
>
> *Haynes v. U. S. F. & G. Co.* (D. C., W. D. Okla.), 6 F. Supp. 272.

Under the circumstances, respondents had certainly acquired rights prior to the insolvency of the bank. The Receiver took the assets subject to liens, equities, or rights arising by express agreement, or implied from

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In The

Supreme Court of the United States

October Term, 1937

No. 32

IRON ROSS, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws,

Petitioner,

v.

W. V. KNOTT, as Treasurer of the State of Florida, W. V. KNOTT, Treasurer of the State of Florida, as ex officio County Treasurer of Taylor County, Florida, etc., et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS

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In The

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No. 32

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Petitioner,

v.

W. V. KNOTT, as Treasurer of the State of Florida, W. V. KNOTT, Treasurer of the State of Florida, as ex officio County Treasurer of Taylor County, Florida, etc., et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS

I.
OPINIONS OF THE COURTS BELOW

The opinion and order of the District Court appear at pages 33 and 38 of the printed record, and are reported in 13 F. Supp. 963. The opinion of the Circuit Court of Appeals appears in the record at page 53, and is reported in 87 F. (2d) 817.

"NOTE: Any emphasis appearing in this brief is supplied."

II.

JURISDICTION

On May 24, 1937, this Court granted a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, to review the judgment of that Court, in this case. (R. 67). The judgment of the Circuit Court of Appeals to be reviewed was entered January 22, 1937. (R. 57.)

III.

STATEMENT OF CASE

We prefer to restate the facts.

In the latter part of 1929 and the early part of 1930, and as shown in part by receipt dated May 2, 1930, appearing as Exhibit 3 to the bill of complaint (R. 19), assets of the First National Bank of Perry, Florida, were delivered to the Bond Trustees of Taylor County, Florida, as security for the safekeeping and prompt payment of public funds of the county. As shown by the receipt which was, by reference, made part of the bill of complaint (R. 7, 19), these assets were *conditionally* redelivered to the bank, to be by it held in trust and segregated. This collateral was "to be released to the bank only by and with the consent of said Board of Bond Trustees, their successors, or assigns, *so long as said funds remain on deposit*" (R. 19). Upon the passage of Chapter 14486, Laws of Florida, Acts of 1929, which created a State Board of Administration to administer the interest and sinking funds of county road and bridge bonded indebtedness and supplementary revenues made available by law, the Bond Trustees, acting pursuant to Section 3 of said act, assigned the collateral to W. V. Knott, State Treasurer, as County Treasurer ex-officio.

On March 12, and March 15, 1930, respectively, other collateral was delivered to the State Treasurer, as County Treasurer ex-officio, to secure any deposits (R. 5, 18) (R. 6, 18) made, or to be made, in said capacity. This collateral was continuously held by him.

In late October, 1930, the bank closed and Ross, the petitioner here, was appointed Receiver. He thereupon delivered some of the collateral so conditionally left with the bank, to said Knott; collected upon a portion of the remainder, remitting the proceeds thereof for application on unpaid balances of such deposits; and retained an uncollected portion, never questioning the terms of the receipt under which the collateral was held segregated and in trust by the bank.

More than five years after the bank closed, Ross, as Receiver, on December 11, 1935, at the direction of the Comptroller of the Currency, filed bill of complaint (R. 1-22), attacking in general the right of Respondents to assert any claim against the collateral as security for unpaid balances of public funds of Taylor County on hand with the bank when it closed. The prayer of the bill appears at pages 15 to 17 of the printed record.

Motions to dismiss the bill of complaint were separately filed by Taylor County (R. 22) and by the remaining Defendants (R. 24). Thereafter, by leave of Court and before hearing, additional grounds of their motion to dismiss, together with supplemental motions to dismiss parts of the bill, were filed by the last named Defendants (R. 26).

In an opinion rendered February 29, 1936 (R. 33) and reported in 13 F. Supp. 963, the District Judge held that the bill of complaint was without equity, since State

banks in Florida were at all times authorized to give such security; the agreements were continuing ones; any obstacle to giving effect to the intention of the parties was removed by the Act of June 25, 1930, amending the National Banking Act; from that day to the closing of the bank in late October, no attempt was made by the bank to reclaim the collateral, although the State law in effect required, and the Federal law then authorized, security to be given. Accordingly, it was held that the collateral stood as security for unpaid balances of such deposits remaining with the bank after the amendment and on hand when it closed. Consequently, decree was entered dismissing the bill (R. 38). The Receiver prosecuted his appeal to the Circuit Court of Appeals, which affirmed the decree of the lower Court, the opinion appearing at page 53, of the printed record, and being reported in 87 F. (2d), 817.

IV.

QUESTION PRESENTED

When a National Bank and persons having the custody of public funds of a Political subdivision of a State, by whose law State Banks could give such security, enter in good faith but prior to June 25, 1930, into continuing agreements pledging specific assets as security for the safekeeping and prompt payment of deposits of such funds, made or to be made; and such collateral is delivered to, and continuously retained by, such persons (or, after its delivery, is conditionally redelivered to, and held segregated and in trust by, the bank, to be released to the bank only by the consent of said persons, never given), and thereafter, upon the amendment of June 25, 1930, to the National Bank Act,

nothing is done by the bank to reclaim the securities so held (although the State Law in effect required, and the Federal Law then authorized, such security to be given); and, there being no suggestion that any security was given in contemplation of insolvency, the bank does not close until late October, 1930, whereupon its appointed receiver turns over to such persons (or remits, for application to their claim, collections from) such collateral so left segregated: Under such circumstances should the Circuit Court of Appeals be held in error for affirming the District Court's decree dismissing the bill of complaint brought by the Receiver December 11, 1935, for the rescission and cancellation of such pledge agreements; or were the two lower Courts correct in holding that the obstacle to giving effect to the intention of the parties, was removed by the Act of 1930, and that the collateral stands impressed with a lien to the extent of the unpaid balances of deposits remaining with the bank when it closed in late October, 1930.

The Respondents contend that the question should be answered in the affirmative, and the judgment of the Circuit Court of Appeals should be affirmed

V.

SUMMARY OF ARGUMENT

1. The cases dealing with the 1930 amendment of the National Banking Act support the rulings of the lower Courts.

2. State banks in Florida could at all times give security for deposits of such funds as are involved in the instant case.

3. The implications, if not the holding, of the *Lewis* case, strongly support, and are in harmony with, the rulings of the lower Courts.

4. The rulings of the lower Courts do equity between the parties, involve no infraction of the *ultra vires* rule, and should be sustained.

5. The relationship between the Respondents and the bank was a continuing one, with the intention implicit that the assets delivered stand as security for unpaid balances of deposits, so long as they should remain with the bank.

6. When the obstacle was removed by the amendment, the original agreement could, as to the future, be given the effect intended by the parties.

7. Independent of the original pledge agreement, the lien can be sustained on equitable principles.

8. The authorities cited by petitioner are neither persuasive not controlling in the instant case.

VI.

ARGUMENT

FIRST POINT

ANALYSIS OF THE CASES DEALING WITH THE 1930 AMENDMENT TO THE NATIONAL BANK ACT SHOWS THAT THEY ARE IN HARMONY WITH AND SUPPORT THE RULING OF THE LOWER COURT

A. Introductory:

In evaluating the decisions which have dealt with the amendment of June 25, 1930, to the National Bank Act, it is important to observe that that amendment provided:

> "Any association may, upon the deposit with it of public money of a state or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the state in which such association is located, in the case of other banking institutions in the state."

46 *Stat. at L.* 809, *U. S. C. Title* 12, *Sec.* 90.

Thus, it will be seen that, even after its passage, no change whatever was made in the existing law with reference to the authority of national banks to give security for private deposits; nor was there any change with reference to the authority of such banks to give security for deposits of public funds of states or their political subdivisions, except as to those banks located

in states by whose law state banks could give like security.

Furthermore, it is noteworthy for purposes of analysis that the Supreme Court of the United States has spoken but three times on the subject, the cases in the order of their decision, with dates of decision indicated being:

Texas & Pacific R. R. Co. v. Pottorff, (2-5-34), 291 U. S. 245, 78 L. Ed. 777, affirming 63 F. (2d) 1;

City of Marion v. Sneeden, (2-5-34), 291 U. S. 262, 78 L. Ed. 787, affirming 64 F. (2d) 721, which reversed 58 F. (2d) 341;

Lewis v. Fidelity & Deposit Co., (6-4-24), 292 U. S. 559, 78 L. Ed. 1425, affirming 67 F. (2d) 961.

It is, therefore, likewise to be borne in mind that any decisions of other courts antedating these are necessarily modified to the extent of any inconsistency with what was therein decided. This comment, of course, extends with equal force to any later inconsistent holdings.

Only one of the three cited cases, factually analyzed, concerned a situation in which there had been any change in the existing law as to the authority of the bank involved. In both the *Marion* case and the *Pottorff* case the type of action held originally to have been *ultra vires* remained so by reason of the fact that the amendment conferred no new authority. So it was that, if done anew after the amendment, such action would, in each of those cases, still have been *ultra vires* and beyond the scope of the authority granted the bank. It is hard-

ly surprising, therefore, to find the Court refusing to attach legal consequences of authorized corporate action to what had taken place, in view of the fact that the type of action complained of was, under the Court's interpretation, still *ultra vires* the corporation.

In the *Lewis* case, on the contrary, was involved a situation in which a change was wrought in the corporate authority, and therefore in the corporate charter, by the amendment; and, accordingly, we find the Court giving effect to the intention of the parties from the effective date of the amendment. It was not necessary to decide, and the Court reserved the question as to whether, by virtue of the amendment to the National Bank Act, there had been any lien prior to the effective date of the amendment. Indeed, the only situation readily apparent in which such a question could be involved in other than an academic way, would be in the event of insolvency of the bank supervening prior to the effective date of the amendment.

Any anlysis of the cases dealing with the amendment which fails to take in consideration the above stated matters is, we sumbit, faulty, and can serve only to confuse the real issue before the Court in this case.

Consequently, we group below into two general groups, decisions which have dealt with the amendment. The first group concerns those cases dealing with attempts to create liens where no new authority was conferred by the amendment; the second, with those where new authority was conferred. In discussing the cases in the first group, it should be borne in mind that it can readily be subdivided so as to show which cases involved attempted security for private deposits; and

which involved attempted security for deposits of public funds where, by state law, state institutions could not give like security. No further subdivision of the group seems necessary. In discussing the second group, it should be borne in mind that it can be subdivided with reference to the factual situation involved, as we indicate below.

B. Analysis shows that the cases readily fall into two groups: (1) those where the amendment conferred no new authority; and (2) those where new authority was conferred.

(1) *Cases of the first group considered:*

a. As we have pointed out, the cases of the first group may be subdivided into those where private deposits were involved; those where public deposits were involved, and into miscellaneous cases.

b. Cases of first group grouped and subdivided:

Cases involving private funds:

Smith v. B. & O. R. R. Co., (3-5-31), (D. C. W. D. Pa.), 48 F. (2d) 861;

B. & O. R. R. Co. v. Smith, (3-10-32), (C. C. A. 3), 56 F. (2d) 799;

Texas & P. R. R. Co. v. Pottorff, (2-5-34), 291 U. S. 245, 78 L. Ed. 777, affirming (C. C. A. 5) 63 F. (2d) 1;

Griffin v. Royall, (4-3-34), (C. C. A. 4), 70 F. (2d) 103;

Eckerson v. Utter, (5-30-34), (D. C. Idaho), 7 F. Supp. 201;

Spradlin v. Royal Mfg. Co., (11-19-34), (C. C. A. 4), 73 F. (2d) 776, reversing 6 F. Supp. 98;

Utter v. Eckerson, (6-17-35), (C. C. A. 9), 78 F. (2d) 307;

Harrell v. Lawhead, (1-9-36), (D. C. N. D. W. Va.), 13 F. Supp. 298;

Phelps v. Cit. Union Nat'l Bank, (2-13-36), (D. C. W. D. Ky.), 13 F. Supp. 623;

Calcasieu Nat'l Bank v. Bank of Abbeville & Trust Co., (5-2-36), (Reh. den. 6-5-36), (C. C. A. 5), 83 F. (2d) 742.

Cases involving public moneys:

City of Marion v. Sneeden, (2-5-34), 78 L. Ed. 787, 291 U. S. 262, affirming 64 F. (2d) 721, which reversed 58 F. (2d) 341;

Faircloth v. Atlantic City, (8-15-36), (D. C. N. D. N. J.), 16 F. Supp. 131.

Miscellaneous cases:

O'Connor v. Rhodes, (6-29-35), (Ct. of App. D. C.), 79 F. (2d) 146.

c. It is quite obvious that cases dealing with the matters treated in those of the first group are not pertinent in the situation before the Court, because at no time, in any of the cases cited under the first group, could any lawful effect be given to the intention of the parties to create liens either before or after the amendment to the National Bank Act. If the courts had given such effect to their intention, it is clear that, under the construc-

tion adopted, the courts would have been continuing an initial abuse of power and would have allowed the parties to do indirectly that which at no time could be done directly. We, therefore, submit that these cases have no bearing upon a situation in which, as in the case before the Court, it was within the authority of national banks after June 25, 1930, to give security for deposits of public funds of states or their political subdivisions. Even in this situation, however, it is interesting to note that in some of the cases the court expressed reluctance, where public funds were involved, in being forced to overturn what had been approved by the Comptroller of the Currency over a long period of years. The only case in the above group requiring special notice at this point is the case of *O'Connor v. Rhodes*, (6-29-35), (Ct. of App. D. C.), 79 F. (2d) 146. It will be observed that that case did not involve public funds of states or their political subdivisions; but in part it did involve a situation in which security was authorized to be given. To that extent, the Court held the attempt to give security valid.

(2) *Cases of the second group considered*:

a. Introductory:

It is apparent that cases in the second group above referred to; that is, those cases in which a change was wrought in the corporate authority by the amendment of June 25, 1930, are capable of further subdivision and classification on the basis of the facts involved. Thus it is possible to divide them into those cases in which insolvency supervened prior to June 25, 1930, and those where insolvency did not occur until after the amendment. Further subdivision of the two sub-classes men-

tioned might be made with respect to the time of deposits; that is, as to whether the deposits were made prior to June 25, or after June 25, 1930; or, even further, as to whether the case involved unpaid balances of deposits remaining with the bank after June 25th.

b. Cases of second group as subdivided:

Cases where insolvency supervened prior to June 25, 1930:

Mays v. Board of County Commissioners Creek County (5-16-33), (Reh. den. 7-12-33), (Okla.), 23 Pac. (2d) 664;

Mays v. Wilkinson, (10-18-35), (D. C. Okla.), 12, F. Supp. 350, (apparently decided without reference to the *Lewis* case);

Ross v. Lee, (8-14-36), (D. C. S. D. Fla.), 15 F. Supp. 972.

Cases where insolvency followed the effective date of the amendment:

F. & D. Co. v. Kokrda, (8-12-33), (C. C. A. 10), 66 F. (2d) 641;

Haynes v. City of Woodward, (2-19-34), (D. C. W. D. Okla.), 6 F. Supp. 270;

Lewis v. Fidelity & Deposit Co., (6-4-34), 292 U. S. 559, 78 L. Ed. 1425, 92 A. L. R. 794, affirming 67 F. (2d) 961;

Collins v. School Dist. of Borough of Trafford, (7-16-34), (C. C. A. 3), 72 F. (2d), 339;

Kavanaugh v. Fash, (12-26-34), (C. C. A. 10), 74 F. (2d) 435;

Hellawell v. Town of Hempstead, (2-5-35), (D. C. E. D. N. Y.), 10 F. Supp. 771;

Standard Investment Co. v. Town of Snow Hill, (6-3-35), (C. C. A. 4), 78 F. (2d) 33;

Ross v. Knott, (2-29-36), (D. C. N. D. Fla.), 13 F. Supp. 963, affirmed 87 Fed. (2d) 817.

c. The first three cases of the second group have no direct application, because insolvency occurred prior to June 25, 1930, and the rights of the parties had become fixed before the amendment. The distinction between those cases and instant case is apparent for, in order to give effect to the intention of the parties, it would have been necessary for the Court to have enforced the lien as of the date of the insolvency of the bank, which insolvency preceded the passage of the amendment conferring powers. We do not concede that the amendment in question was not intended to be curative, so far as any attempts to assert liens where the rights of the depositors had become fixed before the amendment is concerned; but even if this were conceded, it is clear that the difference between that case and the one at bar is marked, for in the instant case, in order to sustain the holdings of the District Court and the Circuit Court of Appeals, it is not necessary at all to give any retroactive effect to the intention of the parties, and the rights of the depositors did not become fixed until long after the passage of the amendment.

d. Several cases in which insolvency followed the effective date of the amendment require specific notice at this point.

In *Lewis v. Fidelity & Deposit Co., supra,* 292 U. S. 559, 78 L. Ed. 1425, 92 A. L. R. 794, affirming 67 F.

(2d) 961, which in all of its implications, in our opinion, supports the holdings of the lower Courts in the instant case, the national bank had qualified as a public depositary under Georgia law, which required bond in double the amount of the deposits. The Fidelity Company was surety on the only bond which was ever executed, and that was in 1928. Georgia law provided that, upon the giving of such bond, a general lien should arise on all of the assets of the bank, whether presently held or subsequently acquired. Pursuant to the appointment deposits were made; and when the amendment of June 25, 1930, was enacted, a balance was on hand with the bank, due the depositor. This balance, it is true, was withdrawn, and it is also true that subsequent deposits were regularly made and aggregated a large sum between the date of the amendment and the appointment of the receiver in 1932. When the bank failed in 1932, the Fidelity Company paid the unpaid balance as of the time of the closing, and took an assignment of the depositor's rights against the bank. The Supreme Court held that, though the bond when originally given, was ineffective to create a lien; yet any obstacle to the creation of the lien was removed by the amendment of June 25, 1930, and the original agreement of the parties could, as to the future, be given the effect intended by them. It was held also that this lien was effective to protect deposits made after June 25, 1930. Consequently the Court allowed the Fidelity Company to assert a lien as against the *general* assets of the bank in the hands of the receiver. Since all of the deposits in bank at the time of the closing, had been made subsequent to June 25, 1930, it was not necessary for the court to express any opinion as to whether a lien had existed from the time of

the original deposits up to the date of the passage of the amendment, and this question the court reserved. But it is significant to note the recognition by the Court of the fact that the transaction between the parties was not completed with the giving of the original bond, but that it was contemplated that there would be continuous dealings between the parties so long as balances should remain on deposit. It is significant also to note that, though the deposits in question were made subsequent to June 25, 1930, the Court held that the lien was entitled to priority "from the date of the Act." This was held, although the Court recognized the fact that no lien arose in 1928, when the bond which was the condition precedent to any lien, was first given. Indeed, we feel that, reading the case as a whole and bearing in mind the purpose of the amendment which, in the Supreme Court's language, "was to equalize the position of national and state banks," the Court considered and treated the amendment as curative in its effect, at least so far as the intention of the parties could be given effect to, without creating retroactive preferences. As we shall later consider this decision separately, we make no further reference to it at this time.

In *Kavanaugh v. Fash, supra,* 74 F. (2d) 435, the Circuit Court of Appeals for the Tenth Circuit held effective a pledge of securities by a national bank, even though not authorized by resolution of its Board of Directors, as required by the Oklahoma statute. It pointed out that the amendment of June 25, 1930, was not procedural and did not affect the manner in which indemnity should be effected. The Court also observed:

> "Furthermore, the enabling act vitalized a previously made pledge with respect to money deposited after it became effective."

In *Fidelity & Deposit Company v. Kokrda, supra,* 66 F. (2d) 641, a national bank gave security for public deposits. The Court held that contracts to secure such deposits made in good faith, *should be sustained,* although not entered into in exact accord with the statutory requirements. The Court said:

> "Furthermore, the bank has not returned the deposit. When it received the deposit, it was its duty to secure the same in the manner provided in the statute. Under such circumstances, it ought not to be permitted to recover the security without returning the deposit."

This duty pertaining to *receipt of deposits,* should apply with equal force to the *retention of deposits* from and after June 25, 1930. If the bank wished to retain the deposits involved in the instant case, it was under a duty to secure them, and, having left Respondents in possession of the collateral, thinking they were secured, should not now be entitled to contend that security was not had.

In *Haynes v. City of Woodward, supra,* 6 F. Supp. 270, bonds were pledged to secure deposits of public funds. Both the pledge and the deposit were made prior to the amendment of June 25, 1930. Subsequent to the amendment, some of the bonds so pledged were returned and other bonds substituted, but some of the bonds continued in the possession of the State Treasurer and were, by the conduct of the bank and the Treasurer, treated as a pledge to secure said deposit. The Court said:

"It is true that originally the bonds were given by the bank to the treasurer of the city of Woodward to secure the deposit prior to June 25, 1930, the date on which the federal law was enacted. However, the Woodward bonds amounting to $28,000 were continued in the possession of the treasurer of the city of Woodward, after the enactment of the law herein set out of June 25, 1930, and, by the acts and conduct of both the city treasurer and of the bank *subsequent to June 25, 1930, were* treated as a pledge to the city to secure said deposit.

"However, the conduct of the bank at all times subsequent to June 25, 1930, approving the pledge to the city of Woodward, in the judgment of the Court, would have the same effect as if said entire pledge had been made subsequent to June 25, 1930."

We submit that on and after June 25, 1930, in the instant case, the silence of the bank, under the circumstances disclosed, when under a duty to act and disclaim, is the equivalent of affirmative approval. Conduct on the part of the bank, approving a previously given pledge, such as that demonstrated in the instant case and in the case last cited, if present in the case of *Thompson, Receiver, v. Twin Falls Highway District,* 17 F. Supp. 705, cited at page 9 of Petitioner's brief, was entirely overlooked by that district Court in rendering its decision.

C. State banks in Florida could give security for deposits of such funds as are involved.

State banks in Florida have at all times been authorized and, in effect required, by the legislatively declared

public policy of the State of Florida, to give security out of their assets for deposits of public funds of the kind herein involved. In the instant case the deposits in question were of interest and sinking funds of Taylor County road and bridge bonded indebtedness, such funds resulting from taxation and, of course, being public funds.

That such state banks were at all times authorized to give such security, see the following cases:

First American Bank & Trust Co. v. Palm Beach, 96 Fla. 247, 117 So. 900, 65 A. L. R. 1398;

Davis v. Knott, 109 Fla. 60, 147 So. 276.

Such authority is conceded at page 3 of Petitioner's brief.

D. The implications, if not the holding, of the Lewis case strongly support and are in harmony with the rulings of the lower Courts.

(1) *In many respects the Lewis case went even farther than it was necessary to go in this case:*

a. The bond required of national banks was double that required of state banks; and, since the lien was security for the bond, it was argued unsuccessfully that it should be invalid as being in double the amount of the deposits, and, therefore, no lien at all, but in reality a preference.

b. The lien allowed to be enforced was a general one and was not limited to specific assets of the bank.

c. The lien attached not only to the assets on hand with the bank at the time of making deposits, but also

reached after-acquired assets of the bank, including those captured upon insolvency by the receivership.

d. The lien was allowed, although it was in form security for the bond, and not for the deposits made.

e. The right allowed to be asserted was a right against assets of the bank in the hands of the receiver; and not as here as against assets in the hands of public authorities, or held segregated by the bank under trust receipt, to be released to the bank only with the consent of the public authorities. It was allowed as against the assets captured by the receivership upon the theory that those assets only belong to the bank, the creditors, and the receiver, which come to the receiver unimpressed with the rights of others acquired prior to, and not in contemplation of, insolvency.

f. The right which was allowed to be asserted was a right arising by way of assignment and subrogation after the surety on the bond had paid the public authorities and had taken an assignment of their rights which it was asserting in the action.

(2) *In almost all respects the two cases are strikingly similar:*

a. In both the cases, the lien was contractual and does not arise *proprio vigore* from any statute.

b. In each of the cases the original agreement of the parties could not, at the time first entered into, be given effect, solely because of the obstacle of the paramount federal law.

c. The lien in the *Lewis* case could not arise except upon the giving of the bond; yet the only bond given

was in 1928. The Court held that it was not necessary to go through the form of executing a new bond. In the instant case it seems similarly unnecessary to have gone through the form of withdrawing the deposit and redepositing it after June 25, 1930. In the instant case, as in that, the obstacle to giving effect to the intention of the parties was removed by the amendment, which provided that security might be given upon the deposit of public funds. If in the *Lewis* case the lien could arise only upon giving of bond, and that was thought not necessary to be given again, the inference is clear that after the passage of the amendment, it was equally unnecessary, in the instant case, to uselessly proceed to withdraw deposits, redeposit them and redeliver all of the securities, when the intention of the parties at all times to give security was clear, and both the securities and deposits were respectively retained by the respective parties at a time when the federal law authorized, and the state law in effect required, security to be given for such deposits.

d. In neither of the cases was it necessary to resort to a retroactive construction of the statute, for the reason that insolvency in neither case occurred until after June 25, 1930; and, therefore, no rights in favor of third parties having in the meantime vested, the intention of the parties could be given effect as to the future; that is, from and after June 25, 1930. It is noteworthy that in the *Lewis* case, although all of the moneys in question had been deposited after the amendment, the lien was allowed priority *from the date of the amendment.*

e. In neither case was the relationship between the parties a closed transaction with the making of the

original deposits; for in both instances it was contemplated that there would be continuous dealings between the parties so long as, and to the extent that, balances should remain on deposit with the bank, the lien in each case to be measured by the unpaid balance of deposits from time to time on hand with the bank.

f. In each case there was a continuing intention that security exist; and in each case the Court gave effect to the intention as soon as that could be done consistent with the paramount federal law.

(3) *The only discernible distinction in the cases, wherein in the instant case could be argued to be weaker, is that in the Lewis case the deposits were made after, and in the instant case before, the amendment. This is a distinction without a difference.*

a. It is true that in the *Lewis* case the court reserved the question and did not decide whether the lien was operative as to deposits made before the amendment. It must be remembered however, in reading what was said by the court in this connection, that the only deposits involved were made after the amendment. Others had been made before then. It results, therefore, we believe, that when the Court said it had no occasion to decide whether the lien was operative also with respect to deposits made before the amendment, all that was meant was that there was no occasion to decide whether, when the obstacle to giving effect to the intention of the parties was removed by the amendment, the effect was to validate the lien from the time of the giving of the original bond and not merely from the time of the amendment. This conclusion, it seems to us, is fortified when it is borne in mind that in the factual

situation involved, the only deposits made before the amendment did not remain on deposit after it, and it was of these deposits that the Court was speaking. The question reserved was whether the amendment should be construed *retroactively* to validate a lien which concededly had not existed prior to the effective date of the amendment. Certainly the opinion contains no suggestion, and it is absurd to contend, that a statute may not operate *in praesenti,* as well as *in futuro,* without becoming subject to the rule that statutes are to be construed as retroactive only when that clearly appears to be their purpose.

b. In view of the authorities cited by the Court in the *Lewis* case, and in particular in view of the case of *Ewell v. Daggs,* 108 U. S. 143, 27 L. Ed. 682, which was cited by the Supreme Court with approval; and having in mind what the Court said with reference to the necessity of going through the form of executing a new bond, it seems to us to be placing a strained construction on the *Lewis* case to suggest that it would have made any difference whether the deposits were made before or after the amendment, so long as unpaid balances thereof remained with the bank subsequent to the amendment and so long as insolvency of the bank had not in the meantime supervened.

c. It may be remarked in passing that the Supreme Court by no means indicated that the statute was not intended to have a retroactive construction and to apply to transactions occurring prior to the amendment. It simply reserved the question. Such a construction is not necessary in this case; but if the purpose of the amendment was, as this Court said it was, to equalize the

position of national and state banks, such construction is highly plausible. Thus, in this case, retroactive construction would have been necessary if it were contended that there was, prior to June 25, 1930, any lien on the securities pledged. In view of the fact that insolvency did not occur until after June 25, 1930, this question was not necessary to be decided and is academic.

E. Conclusion as to the First Point

(1) *None of the authorities are in conflict with the result reached by the lower courts.*

a. As pointed out, there is a vast difference between those cases in which no new authority was granted by the amendment, and those where new authority was granted; principally because in the first class no effect could be given the intention of the parties without violating the paramount provisions of federal law and allowing the parties, by indirection, to do that which could not directly be done.

b. In cases where new authority was granted, the situation where insolvency supervenes before the amendment is different from that in which it does not; this is so because in the former case retroactive construction is called for; in the latter, not.

c. Analysis of those cases at all in point has developed that none are contrary to the result reached by the District Court and the Circuit Court of Appeals.

(2) *All of the pertinent authorities support the result.*

In discussing those cases dealing with situations in which the amendment conferred new authority, and in

particular those cases which have dealt with situations in which insolvency supervened only after the effective date of the amendment, we have pointed out, and it is almost unnecessary here to reiterate, that some of the cases directly, and others by strong implication, support the conclusions reached by the lower courts.

SECOND POINT

THE RULINGS OF THE COURTS BELOW DO EQUITY BETWEEN THE PARTIES, INVOLVE NO INFRACTION OF THE ULTRA VIRES RULE, AND SHOULD BE SUSTAINED

A. The justice of the situation should appeal strongly to the conscience of a Court of Equity.

(1) *Respondents were misled by the prior administrative rulings of Comptrollers of the Currency of the United States.*

For many years the various Comptrollers of the Currency of the United States had uniformly disapproved and refused to allow pledges by national banks of their assets as security for private deposits. For a like period of time they had as uniformly approved and allowed, in states where other banks enjoyed such privileges, national banks to pledge their assets to secure deposits of public funds of states or their political subdivisions. All parties assumed that the pledges might be made and would be effective; they acted accordingly.

On this basis, and his basis alone, it was that at the beginning of the relationship of the parties, public interest and sinking funds of the county involved were

deposited and security, as it was thought, taken for such deposits.

(2) *Respondents acted in entire good faith; and it is not even inferred that anything was done with any intent to defraud, or in contemplation of insolvency.*

The bill of complaint contains not the faintest suggestion but that Respondents acted in the utmost good faith. No allegation regarding the original deposits and the original delivery of the securities conveys any idea that there was, or was contemplated, anything in the nature of a transfer of assets of the bank in contemplation of insolvency. The liens were to exist for the safekeeping and prompt payment of the moneys then deposited, or thereafter to be deposited; they were not limited in their incidence to the event of insolvency of the bank. It becomes plain with what good faith the dealings were had, and with what honesty the whole transaction was conducted from its beginning until after the appointment of the receiver, for we find him (and inferentially with the approval and after the advice of the then Comptroller of the Currency) carrying out the intention of the parties by recognizing Respondents as secured creditors and so treating them.

(3) *Respondents were misled and lulled into security by the conduct of the bank subsequent to the amendment.*

Whatever might be said of the original authority of the bank before the Act of 1930 to pledge its assets as security for such deposits as are here involved, it is apparent that full authority was enjoyed by the bank from and after June 25, 1930. In this situation, Respondents were continued in the possession, either actual or constructive, of the securities intended to be pledged,

and were allowed to think that they were secured. It is true that the bank took no affirmative action, so far as it appears from the bill of complaint, one way or the other, after the passage of the amendment. It cannot be ignored, however, that the situation was such that if the bank did not wish its assets to be treated as pledged to secure balances thereafter remaining on deposit, there was in equity and all good conscience a duty upon it to so advise the Respondents, in order that the deposits might be withdrawn. This is so because of the fact that Respondents were continued in the possession of such assets and, on the strength thereof, allowed the bank to retain the unpaid balances of the deposits at a time when the federal law authorized, and the state law in effect required, security to be given. Surely under such circumstances, the conduct of the bank is equivalent to affirmative action insofar as the retained balances and *security therefor are concerned*. Public officials are presumed, absent a showing to the contrary, to perform the duties cast upon them by the law. The lower Court refused to indulge in a harsh presumption that had the bank attempted to reclaim the security, the deposits would have been left with the bank when the Respondent state treasurer was required by a legislatively declared public policy to exact security for moneys deposited by him. Certainly this action on the part of the lower Court should appeal to the conscience of this Court, particularly in view of the fact that this Court, both in the *Lewis* case, and in the case of *Pottorff v. El Pasco-Hudspeth Counties Road District*, 62 F. (2d) 498, ceritorari den., 289 U. S. 724, 77 L. Ed. 1474, 53 S. Ct. 522, upheld the power of national banks to pledge their assets as security for deposits of public funds of states or their political subdivisions.

(4) *Respondents in this case are fiduciaries themselves.*

It cannot be ignored, in dealing with the case, that the moneys left on deposit with the bank after the amendment, and which remained on deposit until the closing of the bank, were trust funds. They constituted the proceeds of the exercise of the power of taxation and were public funds in the fullest sense of the word. We feel that this Court will realize the equities of the situation and consider, as did the Court in the case of *Haynes v. U. S. F. & Co.*, (D. C. W. D. Okla.), (2-19-34), 6 F. Supp. 272, that:

> "The laws governing the operation and management of banks ought not to be construed to show a greater solicitude for the protection of general depositors in a bank than in the protection of trust funds . . . deposited with the bank, which in fact are the funds of the taxpayers, assessed and collected for a public purpose. . . ."

B. The relationship of Respondents and the bank was a continuing one, with the intention implicit that the assets delivered stand as security for unpaid balances of deposits so long as they should remain with the bank.

(1) *It is fallacious to contend that the relationship of the parties ended with the original deposits.*

When the original deposits were made it was never contemplated between the parties that the relationship of the public officials to the bank should cease with such deposits. Indeed, the very form of the transaction, of

which the deposit was only the beginning, shows very clearly that it was contemplated that there would be continuous dealings between those parties so long as, and to the extent that, the public funds should remain on deposit with the bank. The liens were intended not merely as security for the original deposits, but as the exhibits themselves show, were intended also as security for *unpaid balances* from time to time remaining on deposit with the bank. Nothing can be clearer than that it was contemplated that from time to time withdrawals would be made and new deposits credited to the accounts; nor can anything be more manifest than that there was a continued and continuous intention of the parties that the assets stand as security for unpaid balances remaining with the bank, and that those assets should stand as security only to the extent of such unpaid balances. Thus the lien contemplated was a lien of changing content and, by no stretch of the imagination, can it be successfully maintained that what was done was a closed transaction at the time of the original deposits, and to be governed merely by the laws as they then existed.

(2) *Implicit in the dealings was the intention to give security so far as it could be given consistent with the paramount federal law.*

We did not contend in the lower Court, and it is not necessary for us here to contend, that by virtue of the amendment of 1930 a lien was validated from the date of the original deposits to the date of the amendment; but we did contend in the lower Court, and we here contend, that a fair consideration of the circumstances will disclose that there was a continued intention, on the part of the bank, to give security insofar as that se-

curity could be given consistent with paramount requirements of the federal law. It may be, as counsel for Petitioner so earnestly contends, that no security existed prior to the effective date of the amendment. It may be that under the law no effect could be given to the intention of the parties insofar as that intent conflicts with the federal law. But neither in the bill of complaint nor in any cited case is it shown that under such circumstances as are here involved, effect cannot be given to the intention of the parties, when that intention is a continuing one and when, in part, it is consistent with the federal law and consistent also with the laws of the state which govern, and are applicable to, national banks, so far as such state law does not conflict with federal law enacted for their government. To say that effect cannot be given to the intention of the parties, when that intent conflicts with federal law, is one thing; to say that when the intention is continuing, effect cannot be given to *it when consistent* with both the federal and the state law, is quite another. The lower courts refused to entertain any such inequitable view as would be involved in the latter assertion. They found ample room to distinguish between the portion of the transaction (and by the transaction we mean the continuous relationship of the parties from the time of the original deposits to and including the appointment of the receiver) which unwittingly attempted to contravene federal law, and that portion which involved no such contravention. They realized that in this case, as in the *Lewis* case, it was competent for the bank to accept appointment as a public depository; they were cognizant of the fact that the relationship of the parties was a continuing one; and they were sensible of the in-

justice involved in allowing a cancellation of any lien to the extent of unpaid balances remaining after June 25th under such circumstances as that it was apparent that Respondents could not be restored to their original situation.

C. - Sustaining that portion of the agreement of the parties which was consistent with the federal law involved no infraction of the ultra vires rule.

(1) *A consideration of the ultra vires rule shows that it is based on three grounds, no one of which is here applicable.*

It has been recognized in decisions of this Court, in many cases, that the doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its powers, is void, rests upon three grounds, and three grounds alone:

a. The obligation of one contracting with a corporation to take notice of the legal limits of its powers.

b. The interest of the stockholders not to be subject to risks not undertaken.

c. The interest of the public that the corporation not transcend powers conferred on it by law.

It would be mere pedantry to recite all of the decisions in which this has been recognized. We do cite one:

McCormick v. Market Bank,
165 U. S. 538, 549, 41 L. Ed. 817.

As to any attempt to assert the existence of a lien prior to June 25, 1930, these reasons might be applicable in the instant case; but as to any lien for unpaid bal-

ances remaining on deposit after that date, the reasons do not exist. This is so because both federal and state law then coincided to allow such pledges. If Respondents were on notice of the lack of corporate power at the time of the original appointment of the depository, it follows with equal force that the depository was on notice on June 25, 1930, that it did have the power; and there being a continuing intention and a continuing relationship between the depository and defendants, it was on notice equally that it was inequitable for it to retain the deposit, leaving defendants in possession of collateral, thinking themselves secured, when it must have realized that any attempt to reclaim the collateral would have resulted as surely in a withdrawal of the deposits. *If the reason for a rule fails,* the rule also fails, as applied to a particular case.

(2) *The doctrine of ultra vires is not favored in the law.*

As illustrative of the position that the doctrine of *ultra vires* occupies in our law, we quote the following from a decision of the Supreme Court of the United States:

> " . . . The doctrine of *ultra vires,* whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided. . . ."
>
> *San Antonio v. Mehaffy,*
> 96 U. S. 312, 315, 24 L. Ed. 816.

(3) *The presumption is that corporations contract within their powers.*

We submit that when a contract of a corporation is not in its entirety beyond the scope of the power of a corporation, it will in the absence of proof to the contrary, be presumed to be valid, for the rule is that corporations are presumed to contract within their powers.

Ohio & M. R. Co. v. McCarthy,
96 U. S. 258, 24 L. Ed. 693.

Thus in this case, though one of the incidents of the relationship of the parties, namely, the existence of a lien prior to June 25, 1930, might have been beyond the corporate power; it does not follow that another incident of such relationship, that is, the existence of a lien as to unpaid balances after June 25, 1930, is likewise beyond the corporate power.

(4) *As far as the doctrine of ultra vires is concerned, each case must be judged on its own particular facts.*

We have thoroughly and carefully considered all of the decisions of the Supreme Court of the United States which we have been able to find, dealing with the doctrine of *ultra vires* as applied to corporate acts. We believe that it is enough for us to remind the Court of the fact that corporations have been held liable for crimes and torts which certainly were beyond the corporate authority granted. They have been held liable for contracts made on their behalf by promoters, though at the time of these contracts, the corporation, by hypothesis, was not in existence and had no power at all. By construction, in numbers of cases and in the face of statutory statements that such acts if done, would be *void,* the courts have held, where equity called for such a holding that such corporate action, even in the face of a prohibition, might be binding upon the corporation.

We are inclined to feel, with Mr. Morawetz, that each case is to be judged with reference to its particular circumstances and that the legal enforceability of agreements is purely a question of positive law. In fine, we feel, after a full reading of this Court's decisions dealing with the question, that *ultra vires* contracts of corporations must be treated as binding or not binding, or to be followed by *other* legal consequences according to the purpose and meaning of the prohibition against such action to be found in the law. In support of this view, we feel that it should be borne in mind that this Court has frequently held that the invalidity of a contract made by a corporation in excess of its chartered powers, may be cured by a subsequent act of the legislature, and that the contract is by such subsequent act, made as valid as if it had been originally authorized. This clearly demonstrates that the want of legislative authority to *enter into* a contract affects the remedy merely and does not affect the existence of the contract itself. This would seem to follow because of the fact that the legislature would have no power to create a contract between the parties where there had been none before. That such vitality can be breathed into an originally *ultra vires* contract, see the cases of

Gross v. U. S. Mortgage Co.,
108 U. S. 477, 488, 27 L. Ed. 795, 798;

West Side Belt R. R. Co. v. Pittsburg Construction Co.,
219 U. S. 92, 55 L. Ed. 107;

Charlotte Harbor & N. R. Co. v. Wells,
260 U. S. 8, 67 L. Ed. 100.

We cite these cases merely to show that the question in reality involved is one affecting the remedy, and not the substantial question of whether there was any contract at all, for it is not necessary, as we have pointed out, for us to contend that the act in the instant case was effecive retroactively to validate liens which had not existed prior to its passage. We feel, and we strongly urge upon the Court, the view that as any prohibition against securing public deposits by national banks was based upon grounds of public policy alone, it is but reasonable that the effect of the prohibition upon the legal validity of corporate acts should be determined by the requirements of that public policy. From and after June 25, 1930, the public policy was clear; and certainly to hold the lien existed from and after that date with respect to unpaid balances, does not contravene it.

D. When the obstacle was removed by the amendment, the original agreement could as to the future, be given the effect intended by the parties.

We submit that in this case, as in the *Lewis* case, the removal of the original obstacle by the amendment of 1930 permitted the original agreement thereafter to be given the effect intended by the parties, and that a lien became operative upon the pledged assets to the extent of the unpaid balances of deposits thereafter remaining with the bank.

Lewis v. Fidelity & Deposit Co., supra.

See *Cox v. Hart,*

260 U. S. 427, 435, 67 L. Ed. 332, 337;

Ewell v. Daggs,

108 U. S. 143, 27 L. Ed. 682.

In the case of *Ewell v. Daggs, supra,* text 148, this Court said:

> "It is claimed by the appellant that, notwithstanding this repeal of the usury laws, the rights of the parties are to be determined according to the law in force at the time the transaction took place; that by the terms of that law the contract . . . was void as to the entire interest reserved and paid; that no subsequent law could make valid a contract originally void . . .
>
> "It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be 'void and of no effect.' . . .
>
> "All that can be meant by the term, *according to any legal usage,* is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land . . ."

The Court, in the last case cited, recognized that there was a distinction between acts bad in themselves and those which are bad because prohibited. It further recognized that the repeal of usury laws without a saving clause, cut off the defense as to the future and that such repeal could have such operation against all objections that the repeal deprived parties of vested rights or impaired the obligation of their contracts. In commenting upon this the Court went on to say, text 151:

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, so long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this Court. . . .

"The right which the curative or repealing act takes away in such a case, is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect."

E. Independent of the original pledge agreement, the lien can be sustained on equitable principles.

We submit that, quite apart and separate from the original delivery of the assets as collateral, the right

of the Respondents to assert a lien as to unpaid balances remaining with the bank after June 25, 1930, can be sustained on equitable principles.

We have pointed out that it was not beyond the power of the bank to accept appointment as a depository. Certainly, therefore, when it left the Respondents in the possession, actual or constructive, of the securities and retained the balance after June 25, 1930, it did so under such circumstances as that good faith required security to be given.

Leaving out all that portion of the transaction which had occurred prior to the passage of the amendment, except the appointment of the bank as depository, which concededly was valid, the situation then was that Respondents were required by a legislatively declared public policy of the State of Florida to exact security for deposits of public funds. It cannot be doubted that this duty was a continuing one.

Moreover, it is settled that a national bank is subject to state law unless that law interferes with the purposes of its creation or destroys its efficiency, or is in conflict with some paramount federal law.

Lewis v. Fidelity & Deposit Co., supra,
292, U. S, 559, 566, 78 L. Ed. 1425, 1431.

Thus when the bank was authorized by federal law to give security, the paramount obstacle was removed, and it then became the duty of the bank to secure deposits as required by the legislatively declared public policy of the state, or to return the deposits.

See *Fidelity & Deposit Co. v. Kokrda, supra,*
(C. C. A. 10), 66 F. (2d) 641.

The factual situation was such at that time that there is ample basis for implying the existence of a new contract, if it should be held that the original agreement of the parties could not in any wise, even as to the future, be given effect.

It was not necessary to go through the form of withdrawing the deposits and redepositing them and of redelivering the securities.

Lewis v. Fidelity & Deposit Co., supra.

Certainly it cannot be maintained that if this form had been followed, there would have been, having in view the allegations of the bill of complaint, any conduct to which general depositors of the bank could have objected.

Lewis v. Fidelity & Deposit Co., supra.

If there was any question as to the manner in which the securities were held segregated by the bank, all doubts on that score are removed by a consideration of the following cases:

Clark v. Iselin,
21 Wall. 360, 22 L. Ed. 568;

Burrowes v. Nimocks,
(C. C. A. 4), 35 F. (2d) 152;

Sexton v. Kessler,
225 U. S. 90, 56 L. Ed. 995;

Capital Savings & Loan Ass'n v. Olympia Nat'l Bank,
(C. C. A. 9), 80 F. (2d) 561.

Under the circumstances, Respondents had certainly acquired rights prior to the insolvency of the bank. It

is recognized by many cases that a receiver of a national bank takes the assets of the insolvent national bank subject to claims and defenses which might have been interposed as against the insolvent corporation; and that liens, equities, or rights arising by express agreement or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated.

Scott v. Armstrong,
146 U. S. 499, 36 L. Ed. 1059;

Merrill v. National Bank of Jacksonville,
173 U. S. 1431, 43 L. Ed. 645.

If, therefore, any right, lien, or equity arose in the instant case, intermedite the passage of the amendment and the insolvency of the bank and the appointment of its receiver, that right does not operate illegally *to prefer Respondents over general depositors. For,* as was said in the case of *Scott v. Armstrong, supra*:

> ". . . The requirement as to ratable dividends is to make them from what belongs to the bank; and that which at the time of the insolvency belongs of right to the debtor, does not belong to the bank".

As pointed out by the opinion of the Circuit Court of Appeals in the instant case (R. 56):

> "When the purpose of the statute is considered in the light of the long continued practice of National banks, known to and recognized by the Comptroller, of giving security for public deposits, and the desire of Congress to authorize

this practice, it would, we think, be an unreasonable construction of the Act to hold that Congress intended by it to provide that, in order to be valid, all existing arrangements for security must be cancelled out and new ones entered upon. We think the contrary intent manifest. We know from the history of the Act that its purpose, we think its effect, was to fully enable national banks to compete with state banks. We think that from and after its passage, as to all public funds on deposit in national banks in states where state banks could give security, whether deposited before or after the passage of the Act, arrangements made before its passage for their security, equally those made afterward, are valid."

If there be any force or virtue to the oft-repeated statements that he who seeks equity must do equity; that equity considers as done that which ought to be done; and that equity looks through the form and regards the substance of a transaction, then the instant situation is one in which there was a crying need for their application.

It must be remembered that this is a suit for cancellation and rescission by a fiduciary against fiduciaries; by a trustee against trustees; and in a situation in which the trustee suing is suing for that which in equity did not belong, and should not belong, to the bank under the circumstances; whereas relief was sought against the fiduciary Respondents, which would inevitably, if granted, cause a proportionate loss of trust funds committed to the care of the Respondents who acted in good

faith in all of the transactions regarding the security involved. Certainly the decisions of the lower courts were equitable, just, and should be sustained.

THIRD POINT

THE AUTHORITIES CITED BY PETITIONER ARE NEITHER PERSUASIVE NOR CONTROLLING IN THE INSTANT SITUATION

1. The entire brief in its argument as to preference, assumes that the rights of the creditors became fixed before the date of the closing of the bank; the entire argument for rescission is predicated upon the mistaken assumption that no liens were held by defendants. There being no suggestion as to any transaction in contemplation of insolvency, such argument begs the real question; namely, as to whether security was held.

2. *The brief entirely overlooks the fact that the relationship of the parties was not closed with the original deposit and that such deposit did not constitute a closed transaction.* It fails to consider the fact that the intention of the parties to give security and their relationship were continuing and continuous.

3. It ignores the fact that if any portion of the agreements of the parties was *ultra vires,* that part is separable and distinct from the portion which was not *ultra vires,* by reason of the amendment of 1930.

4. It persistently insists that Respondents contend for a retrospective construction of the statute; whereas such retrospective construction is not contended for; nor was it necessary to reach the result arrived at by the lower Courts. As pointed out by this Court, in the *Lewis* case,

a statute is not retrospective or retroactive in its operation simply because it draws upon antecedent facts.

5. We turn now to a more detailed consideration of the Petitioner's brief; but we shall not attempt in this brief to analyze all of the cases cited. Many of them have been sufficiently distinguished by what we have hitherto said; in others the distinction will be apparent to the Court upon a reading and consideration of them.

a. In view of the receipt, (R. 19) the statement on page 3 of Petitioner's brief, that *certain* collateral remained in the physical possession of the bank, is not strictly correct. The receipt shows a *conditional* delivery of certain collateral to the bank, to be by it held in trust and segregated. Respondents still held constructive possession and the right to actual possession.

Clark v. Iselin,
21 Wall. 360, 22 L. Ed. 568.

b. In answer to what appears at pages 7 and 12, it may be said that the *Sneeden* case involved a situation in which at no time could the intent of the parties be given effect without allowing indirectly what could still not be done directly.

c. At page 15, in answer to the method of construction urged, we reiterate that no retrospective construction was necessary; that the transactions were not closed with the original deposits. On the one hand, Petitioner maintains that the deposit might be retained, thus swelling the liquid assets of the bank; and on the other, that even after banks could give security, he should be allowed to recapture it and thus further swell the assets of the bank beyond the amount to which the creditors should in equity be entitled to look.

d. At page 17 we may observe that a statute does not operate retrospectively because it is applied to an existing situation. This also is a case of prospective operation. The Act, it may be observed, brought into existence no new obligation. It simply removed an obstacle to the enforcement of the intention of the parties as to the future. Whose vested rights were impaired? At page 12 the argument as to ratification is a fallacy. It is fundamental that ratification involves a relation back; that giving effect to the intent of the parties *in praesenti* and *in futuro* does not. Again we find the mistaken idea that the relationship of the parties was a closed transaction with the original deposit. The cases cited at pages 12 *et seq.*, dealing with illegal contracts, are not in point, first because of the continuing character of the relationship in the instant case and, secondly, because it was there sought to give retroactive effect to the later laws and thus make the original closed transaction valid from the beginning. We may recognize that the mere passage of a law might not have validated the transaction in those cases from the beginning, and still recognize that considering the act, the situation of the parties, and all the circumstances, it is equitable to give effect to the intent of the parties as to the future. Incidentally, much of what was argued in these cases was repudiated in the case of *Ewell v. Daggs, supra,* which was cited with approval in the *Lewis* case. All of the cases dealing with *ultra vires* transactions involved situations in which, at the time that it was attempted later to assert their validity, the type of action involved was still *ultra vires.*

CONCLUSION

The action of the District Court in dismissing the bill of complaint, under the circumstances disclosed by the record, which was affirmed by the Circuit Court of Appeals, is, we submit, action which has regard for the ideals of honesty and fair dealing, whether by governmental or private parties; which gives effect to substance rather than to form; and which applies the tests of conscience and fair dealing, so that any claim of the bank for a rescission must yield before the apparent equities of the Respondents. In short, we feel, as did the lower Courts, that equitable principles should not be sacrificed upon the altar of tenuous distinctions. The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 32

M. G. McNAIR, AS RECEIVER OF THE FIRST NATIONAL BANK OF PERRY, ETC.,

Petitioner,

vs.

W. V. KNOTT, AS TREASURER OF THE STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF OF RESPONDENTS.

CARY D. LANDIS,
Attorney General of Florida;
H. E. CARTER,
J. COMPTON FRENCH,
Assistant Attorneys General;
T. J. SWANSON,
Counsel for Respondents.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF OF RESPONDENTS.

I.

The Attempted Distinction of the Lewis Case Is Based Upon a Fallacious Premise.

The first proposition in petitioner's reply brief is an attempt to distinguish the case of *Lewis, Receiver,* v. *Fidelity and Deposit Company of Maryland,* 292 U. S. 559, from the instant case. The argument is based upon a fallacious premise and must fall. In speaking of the *Lewis* case counsel states: " • • • we may assume, for purposes of discussion, that it was not beyond the power of the bank to give a bond, nor in fact to give a surety bond." We cannot assume any such thing. An examination of the *Lewis*

case shows that when, under the Georgia statute, a surety bond was given, a lien was created upon all the assets of the bank for the performance of the conditions of that bond. The statute was in existence at the time the bond was given, and of course became part of the bond contract just as though the words of the statute were actually written into it. *Counsel reasons that it was perfectly legal for* the bank to give the bond because the bank could not be held to its promise contained therein creating a general lien upon all of its assets. In other words, that the bond was a mere scrap of paper and therefore could be legally given.

As authority for their assumption counsel cite the case of *Texas and Pacific Railway Company* v. *Pottorff*, 291 U. S. 245, but we call attention to the fact that in that case this Court, in speaking of the giving of a surety bond to secure *private* deposits, said:

> "Such a practice would likewise be a departure from the policy of equal treatment of depositors;". (Text, page 256.)

It seems clear that when the bank in the *Lewis* case gave a surety bond in 1928, it committed an *ultra vires* act.

Counsel contends the assets of the bank were dissipated, but we find nothing in the record justifying that statement. The assets pledged were not given away, or wasted. They were merely pledged to secure repayment of balances in the hands of the bank, which balances were never repaid.

II.

The Trial Court's Opinion Is Correct.

Counsel's second proposition is also without merit. It is contended that the trial court should have required an answer to be filed by the defendants showing a new contract to give security or implying such a new contract. The

bill of complaint was filed in December, 1935, long after the Act of June 25, 1930. It was not necessary for the defendants to plead the statute and of course the trial court took judicial notice of it and held that the *original* intention of the parties to give security, for balances on hand at any time, could be given effect to as to those bal*ances remaining on hand after June 25, 1930.*

The Court's opinion states in substance that the bill of complaint showed no deposits after June 25, 1930, and showed no call on the bank for a repledge of the securities. The statement is true and it certainly was not error for the Court to make the statement. Moreover the Court's statement has not been assigned as error.

III.

Action Originally Ultra Vires Remains So In Pottorff Case.

Counsel's third proposition is a mere reiteration of the argument found at page 18 of petitioner's original (white) brief. We feel that it is sufficient to merely call the Court's attention to the fact that the case of *Texas and Pacific Railway Company* v. *Pottorff, supra,* involved the giving of security for *private* funds, which the paramount Federal law prohibited both before and after the Act of June 25, 1930.

Respectfully submitted,

CARY D. LANDIS,
Attorney General of the State of Florida;
H. E. CARTER,
Assistant Attorney General;
J. COMPTON FRENCH,
Assistant Attorney General;
T. J. SWANSON,
Attorneys and of Counsel for Respondents.

(2252)

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1937.

M. G. McNair, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws, Petitioner,
vs.
W. V. Knott, as Treasurer of the State of Florida, W. V. Knott, Treasurer of the State of Florida, as ex officio County Treasurer of Taylor County, Florida, etc., et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 13, 1937.]

Mr. Justice Black delivered the opinion of the Court.

The question presented is whether the National Bank Enabling Amendment of June 25, 1930, which granted power to National Banks to secure deposits of public funds, validates or makes enforceable previous pledge agreements made to protect such funds deposited before the Enabling Amendment became effective.

That Enabling Act[1] provides:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

Before, and at the time this Enabling Amendment was passed, the laws of Florida authorized state banks to give security for public deposits and also imposed upon public officials a duty to obtain such security.[2] In 1929 and 1930, before the passage of this amendment, the First National Bank of Perry, Florida, by agreement with the officials of Taylor County, Florida, pledged collateral security for the protection of county funds thereafter to be deposited from time to time in the bank.

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[1] Ch. 604, 46 Stat. 809, 12 U. S. C., 90.

[2] First American Bank & Trust Co. *v.* Palm Beach, 96 Fla. 247, 117 So. 900, 65 A. L. R. 1398; Davis *v.* Knott, 109 Fla. 60, 147 So. 276.

This contractual relationship, established by the pledge agreement and deposits made thereunder, continued to exist until the bank was closed October 18, 1930. The Receiver for the closed bank at first recognized the pledge agreement as valid and enforceable and accordingly paid the county the income he received from the pledged securities. In 1935, however, the receiver filed this suit in equity in the Federal District Court for the Northern District of Florida, alleging that the pledge agreement was *ultra vires* and illegal and praying that it be cancelled and annulled. Upon motion of the county, the district court dismissed the bill. 13 Fed. Sup. 963. The Circuit Court of Appeals for the Fifth Circuit affirmed. 87 F. (2d) 817. This Court granted certiorari. 301 U. S. —, 57 S. Ct. 930, 87 L. Ed. —.

The issues raised require that we determine:

(1) Did Congress intend to validate existing *ultra vires* pledges?

(2) Could this pledge agreement be validated by changing the law which was in force when the transaction was initiated?

First. The language of the amendment, read in the light of the conditions that brought about the necessity for its passage, leads irresistibly to the conclusion that Congress did intend to make existing pledges enforceable.

The amendment does not expressly exclude existing contracts from its field of operation. On the contrary it extended a general grant of the broad power to give security for public deposits, with a single limitation relating to the kind of security given by state banks. If Congress had desired to limit the remedial grant to subsequent security contracts, it would doubtless have provided an additional limitation relating to prior agreements. This it did not do. Congress alone had the power to write such a limitation in the bill.[3]

Agreements to secure public deposits did not violate any express statutory prohibition; no statute imposed a penalty for making such agreements. Since the banking act of 1863 Congress has passed many laws requiring that security be given to protect deposits of certain public funds.[4]

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[3] Louisville & Nashville Railroad Co. *v.* Mottley, 219 U. S. 467, 479; James *v.* Milwaukee, 16 Wall. 159, 161.

[4] Texas and Pacific Railway Co. *v.* Pottorff, 291 U. S. 257, note 11.

For many years Comptrollers of the Currency assumed that National banks had power to give security for public deposits and approved the practice of the banks in pledging such security. It has been, and is now, the policy of most states to require security for public funds whether deposited in State or National banks. The weight of judicial authority in the state courts has supported the doctrine that banks could pledge security for public deposits, but not for private deposits.[5]

The Senate Committee on Banking and Currency which made a favorable report on the Enabling Amendment gave information to the Senate in its report that millions of dollars worth of collateral had been pledged by National banks as security for public deposits.[6] The Senate and House Committee reports show that the sponsors of the amendment desired it not merely to permit future pledges but also to assure that agreements under which "millions of dollars" of pledges had been made by National banks would be enforceable. One of the chief reasons for the enactment of the amendment was the need for validation of pledges already made. The amendment was designed to meet this need. To determine that Congress did not intend to validate pledge agreements existing when the amendment was passed would greatly limit its curative effect. Such a construction would be an unwarranted departure from the plain intent of this curative and enabling statute.

Second. Appellant insists that the contract could not be validated by changing the law which was in force when the pledge agreement was made.

There is nothing novel or extraordinary in the passage of laws by the Federal Government and the States ratifying, confirming, validating, or curing defective contracts. Such statutes, usually designated as "remedial", "curative", or "enabling", merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions. Such statutes have validated transactions that were previously illegal relating to mortgages, deeds, bonds, and other contracts.[7] Placing the stamp of

[5] See cases collected in 42 Harvard Law Rev. 272; 79 University of Pennsylvania Law Rev. 608.

[6] Senate Report No. 67, 71st Cong., 2d Sess.

[7] Watson *v.* Mercer, 8 Pet. 88 (defective acknowledgment in deed validated by general law); Galveston Railroad *v.* Cowdrey, 11 Wall. 459 (mortgage validated by general statute); Randall *v.* Kreiger, 23 Wall. 137 (defective

legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them. No party who has made an illegal contract has a right to insist that it remain permanently illegal. Public policy cannot be made static by those who, for reasons of their own, make contracts beyond their legal powers. No person has a vested right to be permitted to evade contracts which he has illegally made.[8]

This Court held that the Enabling Amendment removed the obstacle that prevented the enforcement of a contract of a National bank to give security to the State of Georgia for its deposits.[9] In that case as in this case, the bank made an *ultra vires* agreement to secure public deposits. In that case the deposits were made after the law was passed and were legal. In this case the deposits were made before the law was passed and were legal. In that case as in this case, the only illegal element of the agreement was the attempt to give security for public deposits. In that case as in this case, the parties permitted the original illegal security agreement to remain unaltered in its terms after the amendment was enacted. In that case it was held that the security agreement—originally *ultra vires*—became enforceable from the date the amendment became effective. In this case, we hold that the security agreement—originally *ultra vires*—became enforceable from the date the amendment became effective. Let the judgment of the Circuit Court of Appeals be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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power of attorney validated by general statute); Ewell *v.* Daggs, 108 U. S. 143 (note validated by general statute); Gross *v.* U. S. Mortgage Co., 108 U. S. 477 (mortgage validated by general statute); Utter *v.* Franklin, 172 U. S. 416 (bonds validated by general law); West Side Belt Railroad Co. *v.* Pittsburgh Cons. Co., 219 U. S. 92 (contract validated by general statute); Brown *v.* Boston & Maine Railroad Co., 233 Mass. 502 (agreement to purchase stock validated).

[8] Ewell *v.* Daggs, *supra.*

[9] Lewis *v.* Fidelity & Deposit Co. of Maryland, 292 U. S. 559.

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1937.

M. G. McNair, as Receiver of the First National Bank of Perry, etc., Petitioner,

vs.

W. V. Knott, as Treasurer of the State of Florida, W. V. Knott, Treasurer of the State of Florida, as ex-officio County Treasurer of Taylor County, Florida, et al.

On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 13, 1937.]

Mr. Justice McReynolds, concurring.

The challenged judgment, I think, should be affirmed upon the theory that subsequent to the enabling amendment of June 25, 1930, both parties recognized an existing obligation to observe the terms of the pledge agreement, and on this understanding maintained the relationship of debtor and creditor. Discussion of other questions seems unnecessary.

Prior to June 25, 1930, the Perry National Bank obtained deposits of public funds by undertaking to hypothecate certain of its assets to secure their payment. This went beyond the corporate power theretofore conferred. *Texas & Pacific Railway Company* v. *Pottorff*, 291 U. S. 245; *Marion, etc. v. Sneeden*, 291 U. S. 262; *Lewis* v. *Fidelity & Deposit Company*, 292 U. S. 559.

The amendment empowered the bank to secure such deposits by a pledge of assets. For more than three months thereafter the securities originally hypothecated were allowed to remain in the keeping of the trustee without suggestion of change in the outstanding agreement. And during that period prior deposits were allowed to remain with the bank. It closed October 18, 1930. Earlier insolvency is not relied upon.

The receiver claims that as the hypothecation was unlawful when made he became entitled to the assets free of lien.

After the amendment the bank had full power to do what it had undertaken to do. For three months it accepted the benefits of the agreement and allowed the assets to remain with the trustee. All parties assumed the validity of the arrangement and acted in reliance upon it. The result was the same as if the assets had been repossessed by the bank after June 25, 1930, and again hypothecated under an agreement identical with the original one.